No. 97-6270-CFY Title: Gerald R. Caron, Petitioner
v.
United States

Docketed: October 8, 1997 Court: United States Court of Appeals for the First Circuit

Entry	Date	Proceedings and Orders
	Oct 8 1997	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 8, 1997)
	Oct 28 1997	Order extending time to file response to petition until December 8, 1997.
	Dec 3 1997	Brief of respondent United States in opposition filed.
	Dec 18 1997	DISTRIBUTED. January 9, 1998
	Jan 9 1998	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 23, 1998. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 25, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 10, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT April 21, 1998. **********
	Feb 12 1998	Joint appendix filed.
	Feb 23 1998	Brief of petitioner Gerald R. Caron filed.
	Mar 16 1998	CIRCULATED.
	Mar 25 1998	Brief of respondent United States filed.
	Mar 30 1998	Record filed.
	Mar 31 1998	Record filed.
	Apr 3 1998	Letter from the Solicitor General received and distributed.
	Apr 10 1998	Reply brief of petitioner Gerald R. Caron filed.
	Apr 21 1998	ARGUED.

ORIGINAL

No. 97-6270

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GERALD R. CARON,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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97-6270
Caron
v.
United States

QUESTION PRESENTED

Where (1) a person with a felony conviction receives a pardon or has civil rights restored, (2) the pardon or state law allows the person full rights--to the same extent as any citizen--with respect to some types of firearms but not with respect to other types--and (3) the person then possesses one of the permitted firearms and is prosecuted as a felon in possession, is it the case that the "pardon ... or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms" (18 U.S.C. § 921(a)(20)) and that the person therefore falls outside the pardon/civil-rights-restoration exemption from the felon-in-possession law and the Armed Career Criminal Act?

(The cases refer to the issue as being whether or not the "all or nothing" view of pardon/civil-rights-restoration is correct.)

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CITATIONS	iii
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING REVIEW	6
1. The Importance of the Issue	6
2. The "All or Nothing" View Flatly Contradicts the Unambiguous Words of the "Expressly Provides" Clause	8
3. Legislative History and Policy Favor Defendant's Position	11
4. The Circuit Split	14
CONCLUSION	17
Order of the United States Court of Appeals for the First Circuit dated May 9, 1997	Appendix A
Opinion in United States v. Caron, 941 F.Supp. 238 (Sept. 12, 1996)	Appendix B
Order of the United States Court of Appeals for the First Circuit on rehearing dated August 11, 1997	Appendix C

TABLE OF CITATIONS

	PAGE
Beecham v. United States, 511 U.S. 368, 114 S.Ct. 1669 (1994)	2, 6, 8
Thrall v. Wolfe, 503 F.2d 318 (7th Cir. 1974)	12
United States v. Bass, 404 U.S. 336, 92 S.Ct. 515 (1971)	10, 11
United States v. Burns, 934 F.2d 1157 (10th Cir. 1991), cert. denied, 502 U.S. 1124, 112 S.Ct. 1246 (1992)	16
United States v. Caron, 941 F.Supp. 238 (1996)	1, 4
United States v. Caron, 64 F.3d 713 (1st Cir. 1995)	4
United States v. Caron, 77 F.3d 1 (1st Cir. 1996) (en banc), cert. denied, 116 S.Ct. 2569 (1996)	4, 6
United States v. Cassidy, 899 F.2d 543 (6th Cir. 1990)	Passim
United States v. Clark, 993 F.2d 402 (4th Cir. 1993)	14
United States v. Dahms, 938 F.2d 131 (9th Cir. 1991)	15, 16
United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992), cert. denied, 506 U.S. 1083, 113 S.Ct. 1056 (1993)	8, 13 14, 15
United States v. Ellis, 949 F.2d 952 (8th Cir. 1991)	16
United States v. Essick, 935 F.2d 28 (1991)	14
United States v. Estrella, 104 F.3d 3 (1st Cir. 1997)	Passim
United States v. Gradwell, 243 U.S. 476, 37 S.Ct. 407 (1917)	10
United States v. Indelicato, 97 F.3d 627 (1996)	8, 9
United States v. Lee, 72 F.3d 55 (7th Cir. 1995)	15, 16
United States v. Matassini, 565 F.2d 1297 (5th Cir. 1978)	11

	PAGE
United States v. McBryde, 935 F.2d 533 (1991)	14
United States v. McKinley, 23 F.3d 181 (7th Cir. 1994)	15
United States v. McLean, 904 F.2d 216 (1990)	14
United States v. Miller, 105 F.3d 552 (9th Cir. 1997)	16
United State v. Palazzi, 115 F.3d 906 (11th Cir. 1997)	16
United States v. Ramos, 961 F.2d 1003 (1st Cir.), cert. denied, 113 S.Ct. 364 (1992)	4
United States v. Shoemaker, 2 F.3d 53 (4th Cir. 1993)	14
United States v. Tinker, 985 F.2d 241 (6th Cir. 1993)	15
United States v. Tomlinson, 67 F.3d 508 (4th Cir. 1995)	14
United States v. Warren, 973 F.2d 1304 (6th Cir. 1993)	15
United States v. Wind, 986 F.2d 1248 (8th Cir. 1993)	16

STATUTES

18 U.S.C. § 921(a)(20)	2, 3, 8 9
18 U.S.C. § 922	12
18 U.S.C. § 922(g)	3
18 U.S.C. § 924(e)	1, 3
18 U.S.C. App. § 1201-1203	11, 12
28 U.S.C. § 1254(1)	1

MISCELLANEOUS

Armed Career Criminal Act	1, 3, 5
Firearm Owners Protection Act	7
Senate Report 97-476, 97th Cong., 2d Sess. 4 (1982)	12

PAGE

Mass. G.L. c. 140, §§ 125, 131, 131F 5

Mass. G.L. c. 140, §§ 129B, 129C 5

Mass. G.L. c. 269, § 10. 5

U.S.S.G. § 4B1.4 4

Gerald R. Caron hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, which on appeal by the United States reversed a judgment of the United States District Court for the District of Massachusetts in a criminal case that found petitioner ineligible for sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, dated May 9, 1997, is appended as Appendix A hereto. Also appended (Appendix B) is the opinion of the district court it reversed, United States v. Caron, 941 F.Supp. 238 (1996), William G. Young, J.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on May 9, 1997. Petitioner filed for en banc rehearing June 6, 1997. On August 7, 1997, Justice Souter extended the time limit for petitioning for certiorari to October 6, 1997. (Application No. A-116.) On August 11, 1997, the Court of Appeals, one judge dissenting, denied rehearing en banc (and, having treated petitioner's request for en banc rehearing as a request for (panel) rehearing, denied (panel) rehearing as well). A copy of the order on rehearing is appended hereto as Appendix C.

Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. 18 U.S.C. § 921(a)(20):

> The term "crime punishable by imprisonment for a term exceeding one year" does not include--
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

STATEMENT OF THE CASE

This case raises the key remaining circuit court split under the pardon/civil-rights-restoration exemption under the federal firearms laws. That exemption has generated close to one hundred circuit opinions since its enactment in 1986 and an opinion from this Court as well, Beecham v. United States, 511 U.S. 368, 114 S.Ct. 1669 (1994). This case has a fairly long history, including, as will now be described, a previous appeal to the Court of Appeals (and an en banc opinion) on a separate issue under the pardon/civil-rights-restoration clause.

In 1994, petitioner ("defendant") was indicted, and convicted after jury trial, in the District of Massachusetts for being a felon in possession of a firearm (18 U.S.C. § 922(g)) by reason of instances of possession of rifles and shotguns in Massachusetts in 1993. 18 U.S.C. § 922(g), the "felon in possession" law, makes it a crime for a person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm or ammunition in or affecting commerce.

At sentencing, the district court found that the Armed Career Criminal Act ("ACCA") applied to defendant. The ACCA, 18 U.S.C. § 924(e), requires a minimum 15-year prison sentence for a felon-in-possession who has three or more prior convictions for violent felony or serious drug offenses. The district court found defendant to have four such prior convictions: three very old Bristol County (Massachusetts) Superior Court convictions for breaking and entering or attempted breaking and entering dating from 1958, 1959, and 1963 and a 1970 Orange County, California conviction for assault with intent to murder and attempted murder. Citing the pardon/civil-rights-restoration clause in the definition of the term "crime[s] punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 921(a)(20), defendant argued that, as a Massachusetts resident entitled to vote, sit on a jury, and hold office, his civil rights had been restored with respect to the three old Massachusetts convictions. The clause reads:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

The district court rejected defendant's civil rights restoration argument based on United States v. Ramos, 961 F.2d 1003 (1st Cir.), cert. denied, 113 S.Ct. 364 (1992), holding that the civil rights exemption applied only in the case where the civil rights restoration had been made on an individualized, case-by-case basis. The district court, applying the ACCA guideline, U.S.S.G. § 4B1.4, sentenced defendant to a prison term of 262 months (21 years, 10 months).

A panel of the First Circuit affirmed the conviction. United States v. Caron, 64 F.3d 713 (1st Cir. 1995). On rehearing en banc, however, the First Circuit overruled Ramos and remanded the case for a new sentencing hearing, leaving it to the district court to consider other arguments the government had made as to why defendant could not get the benefit of civil rights restoration, i.e., whether the civil right to sit on a jury had been sufficiently restored and whether there had been an express provision that defendant could not possess firearms. United States v. Caron, 77 F.3d 1 (1st Cir. 1996)(en banc), cert. denied, 116 S.Ct. 2569 (1996).

On remand, the district court ruled that Massachusetts law had restored defendant's civil rights with respect to the three convictions, United States v. Caron, 941 F.Supp. 238 (Sept. 12,

1996) and on October 15, 1996 sentenced defendant to a non-ACCA sentence of 10 years. It based its decision on its finding that Massachusetts had restored defendant's core civil rights--to vote, hold office, serve on a jury--and on the fact that Massachusetts gives an ex-felon the right to obtain a license to have rifles and shotguns as long as the felony (and any resulting prison term) is more than five years old. 941 F.Supp. at 249. (See Mass. G.L. c. 140, §§ 129B, 129C and c. 269, § 10.) It held that Massachusetts's prohibition on an ex-felon's ever carrying a handgun outside the home or business (see G.L. c. 140, §§ 125, 131, 131F and G.L. c. 269, § 10(a)) did not prevent defendant from getting the benefit of the rights restoration. 941 F.Supp. at 250-252.

The government then appealed the district court's ruling.

In its May 9, 1997 opinion, the First Circuit reversed the district court and held that defendant's original ACCA sentence was to be reinstated. In doing so, it followed United States v. Estrella, 104 F.3d 3 (1st Cir. 1997), a case decided while the government appeal of this case was pending and which is directly on point on the issue defendant now seeks this Court to certify. Estrella adopted the "all or nothing" view of the pardon/rights-restoration clause: because Massachusetts law never allows an ex-felon to carry a handgun, the ex-felon falls within the "expressly provides" clause, even though state law may allow the defendant to possess the particular firearm at issue in the federal crime.

REASONS FOR GRANTING REVIEW

1. The Importance of the Issue

The felon-in-possession law and the ACCA are, obviously, among the federal government's most important criminal laws. Thousands of felon-in-possession prosecutions are brought each year and hundreds of defendants, if not more, are sentenced each year under the ACCA. (In Fiscal Year 1995, 3189 defendants were sentenced for weapons offenses to an average sentence of 96.6 months.[1]) Felon-in-possession prosecutions are the mainstay of the federal government's recent effort to join the states in prosecuting violent, inner-city crime.

As already noted, the pardon/civil-rights-restoration clause has led to a vast array of opinions. One circuit split about the clause--the choice of law question whether a person who is disqualified from firearm possession by reason of a federal conviction may have civil rights restored by a state--has been resolved by this Court's Beecham case, supra, p. 2. A second circuit split--whether civil-rights restoration is required to be individual-specific or may occur by operation of law--was resolved in petitioner's own First Circuit en banc case, in which in the First Circuit changed its previous view and joined the seven circuits that had ruled on the issue. See United States v. Caron, 77 F.3d 1, at 2, n.1.

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[1] Judicial Business of the United States Courts 1995, Table D-5, p. 230 (published by the Administrative Office of the United States Courts together with the Reports of the Proceedings of the Judicial Conference of the United States, paper, light blue cover).

The circuit split--the specifics of which are dealt with below--is by no means a minor one nor one whose importance will diminish over time. The cases show that, like Massachusetts, a number of states have laws allowing ex-felons (perhaps after a waiting period) to possess some firearms but not others. Inevitably, all the circuits will take sides on the issue. (Even if some circuits encompass no states that provide for firearm-specific restoration of ex-felons' gun privileges, each circuit will eventually be faced with felon-in-possession defendants who have prior convictions in such states.)

The circuit split here involves two issues of public importance. First, the civil rights restoration clause was added to the law in 1986 as part of "FOPA," the Firearm Owners Protection Act. See United States v. Cassidy, 899 F.2d 543, 545, n.3 (6th Cir. 1990). FOPA, as its name suggests, dealt with an important and controversial issue: the rights of firearms' owners vs. the need to punish firearms crimes. Second, the issue here involves a key issue of balance between the federal government and the states: to what extent does federal firearms law defer to state law on who should be allowed to have guns and in what circumstances and, conversely, to what extent does federal firearms law override state policy. A key aim of FOPA was to defer to state law and state officials in some areas of firearms law; the issue here concerns how much deference FOPA requires.

In addition, the issue here is not, as it was in Beecham and defendant's earlier appeal, just about civil-rights restoration but about all four types of amelioration of prior convictions that § 921(a)(20) addresses: expungements, set-asides, pardons, and civil-rights restorations.

Another First Circuit case refers to the "proliferated case law, the conflicts, and the utter waste of time incurred by courts and litigants" on the pardon/rights-restoration clause. United States v. Indelicato, 97 F.3d 627, 631 (1996, Boudin, J.). We respectfully suggest that the time has come for this Court to resolve the issue once and for all and that the valuable time this Court spent doing so would result in a substantial net savings to the system as a whole.

2. The "All or Nothing" View Flatly Contradicts the Unambiguous Words of the "Expressly Provides" Clause

Estrella noted that the non-"all-or-nothing" interpretation of the rights restoration provision has "patent virtues":

> it respects the state's own choice; it may provide better warning to the ex-felon if he remains in his state of conviction; and it is probably easier for courts to administer in the first instance (by asking what state law permits as to this weapon).

104 F.3d at 8.

Nevertheless, in adopting the "all or nothing" approach, Estrella said that the contrary approach:

> is less persuasive as a reading of the statute. It strains the literal language of the "unless" proviso, [citing United States v. Driscoll, 970 F.2d 1472, 1480-81 (6th Cir. 1992)]; and while the federal statute does in some measure defer to state law, it does not give carte blanche to the states. [citing United States v. Indelicato, 97 F.3d 627, 629-30. (1st Cir. 1996).] We have overridden literal language where it appeared inadvertent and undermined Congress' aim. Id. But requiring that the state permit the untrammeled possession of firearms is fully consistent with the trustworthiness rationale that underpins the "civil rights restored" provision itself.

104 F.3d at 8.

Defendant's main reason for saying that the "all or nothing" approach is mistaken is shown by a simple example, an example relating not to civil-rights restoration but to a pardon. In the pardon case, § 921(a)(20) exempts convictions as to which there has been a pardon "unless such pardon...expressly provides that the person may not ship, transport, possess, or receive firearms."

Suppose a person with an old felony conviction wants to take his grandchildren hunting. He applies to the governor of his state for a pardon. The governor, sympathetic, wants the person to be able to hunt. On the other hand, the governor strongly advocates handgun control. He sees little reason why any civilian, let alone the ex-felon, should be allowed to have handguns. The governor therefore issues a pardon that lets the ex-felon have some guns but not others, i.e., that the ex-felon "shall have the right to receive, possess, or transport in commerce rifles and shotguns but not handguns."

If the ex-felon now goes hunting, is he prosecutable as a felon in possession?

Clearly not. As a matter of plain English, it is incorrect to say that the "pardon ... expressly provides that the [ex-felon] may not ship, transport, possess, or receive

firearms." The sentence "X may not have firearms" means "X may not have firearms generally." That sentence is false if the sentence "X may have such-and-such types of firearms" is true. If the ex-felon read the statute and asked himself whether his pardon prohibited his possessing firearms, he would say, correctly, that it prohibited his having some firearms but that it certainly did not prohibit his having firearms. If an organization received funding under a grant that required it to prohibit alcohol on the premises, a house rule that prohibited hard liquor on the premises but allowed beer and wine would unquestionably violate the terms of the grant.

It is the "all or nothing" view--not its opposite, we respectfully submit--that not only "strains the literal language of the 'unless' proviso" but violates it. Estrella, supra, p. 5. If there is any unclarity in the statute on how its words apply when ex-felons are allowed some guns, it is that the words "any conviction" suggest that the conviction either does or does not count for all felon-in-possession/ACCA purposes and is not divisible. But this is just a suggestion and certainly does not overcome the literal words of the 'unless' proviso. Any unclarity should, under the principle of lenity, favor the defendant, for Congress has obviously not "plainly and unmistakably" adopted "all or nothing." United States v. Gradwell, 243 U.S. 476, 485, 37 S.Ct. 407, 411 (1917). The Court should also be mindful of the deep words uttered in United States v. Bass, 404 U.S. 336, 92 S.Ct. 515 (1971): "[U]nless Congress

conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Bass, 404 U.S. at 349. It is difficult to harmonize this admonition with the "all or nothing" view, which would prevent states from providing sensible, gun-specific pardons and rights restorations.

The use of the word "expressly" in the "expressly provides" clause strongly favors defendant's position. United States v. Matassini, 565 F.2d 1297 (5th Cir. 1978) construed "expressly" as it was used in a predecessor firearms statute, 18 U.S.C. App. §§ 1201-1203:

> This title shall not apply to.... (2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

18 U.S.C. App. § 1203(2). The court emphasized that pardons granted after 1968, the statute's effective date, "require that authorization to receive, possess, or transport in commerce a firearm be expressed in haec verba, more or less[,]" in order to be effective for § 1203(2) purposes, 565 F.2d at 1301. This accords with the plain meaning of "expressly," defined in The American Heritage Dictionary of the English Language, Third Edition, as "explicitly," which in turn is given to mean "fully and clearly expressed; leaving nothing implied."

3. Legislative History and Policy Favor Defendant's Position

Second, the "all or nothing" approach is wrong because it ignores a primary purpose of the pardon/civil-rights-restoration

exemption: to avoid the injustice that arises if an ex-felon cannot rely on the terms of a pardon or rights restoration and to give considerable deference to the states as to whether ex-felons could have firearms. Part of Congress's goal in enacting the provision was to overrule Thrall v. Wolfe, 503 F.2d 318 (7th Cir. 1974), a case it described as an anomaly. See United States v. Cassidy, 899 F.2d 543 (6th Cir. 1991), tracing the legislative background of the clause and quoting from Senate Report 97-476, 97th Cong., 2d Sess. 4 (1982).

At the time of Thrall, federal firearms laws restricting ex-felons' rights to have firearms existed in both 18 U.S.C. App. §§ 1201-1203 and 18 U.S.C. § 922. Relying on the pardon provision of 18 U.S.C. App. § 1203(2), supra, a governor of Montana issued Thrall a "Full Pardon and Restoration of all Civil Rights lost by reason of the above conviction, and the right to receive, possess, or transport in commerce a firearm" with respect to an old conviction. Id. at 314. (The then § 1203(2) is quoted (with an ellipsis) at Id. at 317.) Thrall held the §1203(2) pardon provision inapplicable to the § 922 restrictions on ex-felons' gun rights and denied Thrall the license.

Senate Report 97-476, 97th Cong., 2d Sess. 4 (1982), referred to above, says the following about what became the rights restoration clause:

> S. 1030 would also exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision as to pardons in 18 U.S.C. §1202, relating to possession of firearms, but through oversight does not include such provision in 18 U.S.C. §922,

> dealing with their purchase or receipt. This oversight has resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision that he may possess it. Thrall v. Wolfe, 503 F.2d 318 (7th Cir. 1974). This change would remove that anomaly. In the event that the official granting the pardon, restoration of rights or expungement of record does not desire it to restore the right to firearm ownership, this provision is rendered inapplicable where the order or pardon expressly provides that the person may not possess firearms.

Cassidy, 899 F.2d at 548.

The "all or nothing" approach is at odds with Congress' purpose as expressed in the Senate report. If, as in our hypothetical case, an ex-felon obtains a pardon/rights-restoration that restores "the right to receive, possess, or transport in commerce rifles and shotguns but not handguns," Congress would clearly have wanted the language to be honored, since it was part of Congress' purpose to allow citizens to rely on the literal terms of a pardon.

This is confirmed by Congress' evident intent to defer to a State's definition of "conviction." As Senator Hatch remarked, "Since the Federal prohibition is triggered by the states' conviction, the States' law as to what disqualifies an individual from firearms use should govern." Cassidy at 549, n.11. Congress even recognized the concern, voiced in Driscoll, that states would have to tolerate criminals denied pistol licenses toting sawed-off shotguns. Before the effective date of the bill, Senator Durenberger commented:

> I believe it is appropriate for all of the States to review, and possibly revise, their laws governing possession of firearms, especially those States regulating possession of firearms by convicted felons.

Cassidy, at 548-549. In eight years between the Senator's warning and Caron's arrest Massachusetts chose not to forbid Caron a rifle and it was evidently Congress's intent to defer to that decision.

4. The Circuit Split

Estrella states that the Sixth and Tenth Circuits have adopted the "all or nothing" view, that the Seventh and Eighth have come to about the same result and that the Ninth Circuit and, possibly, the Fourth Circuit take the opposite view. 104 F.3d at 8.

We respectfully disagree with some of Estrella's analysis of the circuit split. We analyze the circuits as follows:

Fourth. The Fourth Circuit has adopted the non "all or nothing" view. United States v. McLean, 904 F.2d 216 (1990); United States v. Essick, 935 F.2d 28 (1991); United States v. McBryde, 935 F.2d 533 (1991); United States v. Shoemaker, 2 F.3d 53 (4th Cir. 1993); and United States v. Tomlinson, 67 F.3d 508 (4th Cir. 1995). (Estrella, 104 F.3d at 8, mentions Tomlinson and, with a "but see," United States v. Clark, 993 F.2d 402 (4th Cir. 1993); Clark does not appear to discuss the "all or nothing" issue and neither Shoemaker nor Tomlinson mentions Clark as being contrary to their holdings.)

Sixth. United States v. Driscoll, 970 F.2d 1472, 1478-79 (6th Cir. 1992), cert. denied, 506 U.S. 1083, 113 S.Ct. 1056 (1993), adopts the "all or nothing" view in what appears to be dictum. (The primary ground for Driscoll's holding that the

defendant's civil rights were not restored was Michigan's failure to restore ex-felons' right to sit on a jury.) Furthermore, as the concurring opinion in United States v. Tinker, 985 F.2d 241, 245 (6th Cir. 1993) points out, the post-Driscoll case of United States v. Warren, 973 F.2d 1304 (6th Cir. 1993), implicitly rejects Driscoll. (There was a dissent in Driscoll on the "all or nothing" view. The judge who concurred in Tinker did so only because he felt bound by Driscoll and, agreeing with the Driscoll dissent, urged en banc rehearing. 985 F.3d at 245.)

Seventh. United States v. Lee, 72 F.3d 55, 57-58 (7th Cir. 1995) adopts the "all or nothing" view in dictum. The main holding of Lee simply followed an earlier case that held that under Indiana law ex-felons' civil rights are not restored. See United States v. McKinley, 23 F.3d 181 (7th Cir. 1994), noting restrictions on ex-felons' rights to hold office and (while under sentence) to serve on a jury as well as certain firearms restrictions. (We do not fully understand Lee. It first says that it agrees with Driscoll on the "all or nothing" issue (72 F.3d at 57, top half of right hand column). Then, however, it says that it finds United States v. Dahms, 938 F.2d 131 (9th Cir. 1991)--a leading non "all or nothing" case--consistent with its analysis and seemingly distinguishes Lee's situation from Dahms's, saying that "Lee fails the first step of the Dahms analysis because Indiana has not restored his civil rights." 72 F.3d at 57-58.)

Eighth. The Eighth Circuit case Estrella cites is United States v. Ellis, 949 F.2d 952, 955 (8th Cir. 1991). We respectfully suggest that Ellis, whose case involved a gun in violation of state law, is not on point. Indeed, United States v. Wind, 986 F.2d 1248 (8th Cir. 1993) makes it clear that the Eighth Circuit adopts the non "all or nothing" view.

Ninth. The Ninth is a non "all or nothing" circuit. United States v. Dahms, 938 F.2d 131 (9th Cir. 1991); United States v. Miller, 105 F.3d 552 (9th Cir. 1997).

Tenth. Estrella cites United States v. Burns, 934 F.2d 1157, 1160 (10th Cir. 1991), cert. denied, 502 U.S. 1124, 112 S.Ct. 1246 (1992) as adopting the "all or nothing" view. Defendant respectfully suggests that Burns neither supports that approach nor even considers the question. Burns' possession of a firearm was in direct contravention of Kansas law--when he committed the federal crime he was subject to Kansas' law prohibiting an individual from possessing a handgun within five years of release from imprisonment for felony. Id. at 1160.

Eleventh. The Eleventh Circuit appears to have no cases on point. A recent case, United State v. Palazzi, 115 F.3d 906 (11th Cir. 1997), found that the defendant did not have civil rights restored with respect to three Massachusetts convictions and cites Estrella with a "see also". 115 F.3d at 908. But one of the firearms Palazzi was convicted of possessing was a .38 caliber revolver, i.e., a handgun, which a Massachusetts ex-felon is barred from carrying. Thus, Palazzi is not on point.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant this petition.

Respectfully submitted,

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October 6, 1997

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2338

UNITED STATES,
Appellee,

v.

GERALD R. CARON,
Defendant, Appellant.

No. 96-2339

UNITED STATES,
Appellant,

v.

GERALD R. CARON,
Defendant, Appellee.

Before

Torruella, Chief Judge,
Stahl and Lynch, Circuit Judges.

ORDER OF COURT

Entered May 9, 1997

These cross-appeals arise from the resentencing of Gerald R. Caron which occurred on remand from this Court's en banc decision in United States v. Caron, 77 F.3d 1 (1st Cir.), cert. denied, 116 S. Ct. 2569 (1996). The district court concluded that Caron may

not be sentenced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), because his prior Massachusetts convictions should not be counted as predicate crimes pursuant to 18 U.S.C. § 921(a)(20). United States v. Caron, 941 F. Supp. 238, 241-51 (D. Mass. 1996). The latter determination was based, in part, on the finding that "Caron had every legal right under Massachusetts law to obtain a firearms identification card and, once he possessed it, to keep and carry rifles and shotguns." Id. at 251. After concluding that it could not impose an ACCA sentence, the district court departed upward from the guideline sentencing range applicable to Caron as a non-ACCA defendant and imposed a prison term of ten years.

After the district court resentenced Caron, this court decided United States v. Estrella, 104 F.3d 3 (1st Cir. 1997). In Estrella, we adopted an "all or nothing" approach under which a conviction counts within the meaning of § 920(a)(20) if the state continues in any way to restrict significantly the ex-felon's right to ship, transport, possess, or receive firearms. Estrella, 104 F.3d at 8. We also held that "Massachusetts' ban on handgun possession by ex-felons outside the home or business is a substantial enough limit on firearms rights to preserve the federal ban." Id.

We are persuaded that Estrella requires reversal of the district court's determination that Caron's Massachusetts convictions do not count as predicate crimes. Contrary to Caron's suggestion, we do not think Estrella is distinguishable on the ground that Caron possessed a Massachusetts firearms identification card. This card gave Caron only limited firearms privileges under state law, and does not distinguish him from the "ordinary Massachusetts felon" whom we stated is subject to the federal ban. Estrella, 104 F.3d at 8.

It follows that Caron must be resentenced as an armed career criminal. This decision renders moot Caron's appeal from the district court's upward departure. Accordingly, Caron's appeal is dismissed. The district court judgment is vacated and the case is remanded for resentencing consistent with this opinion. See Loc. R. 27.1.

By the Court:

WILLIAM H. NG

Clerk.

[cc: Messrs: Walker, Kelly and Ms. Chaitowitz]

UNITED STATES of America
v.
Gerald R. CARON.

Criminal No. 94-10040-WGY.

United States District Court,
D. Massachusetts.

Sept. 12, 1996.

Defendant was convicted in the United States District Court for the District of Massachusetts, William G. Young, J., of being felon in possession of firearms. Defendant appealed. The Court of Appeals, Coffin, Senior Circuit Judge, 64 F.3d 713, affirmed. Limited rehearing en banc was granted. The Court of Appeals, Coffin, Senior Circuit Judge, 77 F.3d 1, vacated judgment and remanded case. On remand, the District Court, Young, J., held that: (1) substantial restoration of civil rights was necessary and sufficient under statute defining felony conviction to exclude conviction which has been expunged or set aside or for which person has been pardoned or has had civil rights restored; (2) defendant's Massachusetts civil rights were substantially restored since he had right to sit on jury in state; (3) defendant could not be sentenced as armed career criminal; (4) defendant's federal civil rights were not fully restored since he was precluded from serving on federal jury; and (5) defendant could be convicted as felon in possession of firearms.

So ordered.

[1] CIVIL RIGHTS ⇐ 108.1
78k108.1
There is no individual right to possess firearms, and possession of firearm is not civil right. U.S.C.A. Const.Amend. 2.

[1] WEAPONS ⇐ 1
406k1
There is no individual right to possess firearms, and possession of firearm is not civil right. U.S.C.A. Const.Amend. 2.

[2] CRIMINAL LAW ⇐ 1202.16(1)
110k1202.16(1)
"Civil rights" within meaning of armed career criminal statute defining felony conviction to exclude conviction, if it has been expunged or set aside or defendant has been pardoned or has had civil rights restored, comprise right to vote, right to seek and hold public office, and right to serve on jury. 18 U.S.C.A. § 921(a)(20).

See publication Words and Phrases for other judicial constructions and definitions.

[3] CRIMINAL LAW ⇐ 1202.16(1)
110k1202.16(1)
Massachusetts statutes permitting felon to serve as juror if seven years have passed since conviction, but allowing judge to relieve felon from serving on jury panel solely on basis of felony conviction, substantially restored defendant's civil right to serve on jury, and, thus, defendant benefitted from armed career criminal statute defining felony conviction to exclude conviction, if it has been expunged or set aside or if defendant has been pardoned or has had civil rights restored. 18 U.S.C.A. § 921(a)(20); M.G.L.A. c. 234, §§ 2, 8; c. 234A, § 4, subd. 7.

[4] CRIMINAL LAW ⇐ 304(17)
110k304(17)
Court of Appeals ruling on whether criminal defendant's civil rights were restored following Massachusetts felony conviction and whether conviction was predicate crime for sentencing as armed career criminal could take judicial notice of judicial procedures of Commonwealth of Massachusetts to implement statute disqualifying felon from service as juror until seven years have passed since conviction. 18 U.S.C.A. § 921(a)(20); M.G.L.A. c. 234A, § 4, subd. 7; Fed.Rules Evid.Rule 201, 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 1202.16(1)
110k1202.16(1)
Substantial restoration of civil rights is necessary and sufficient under armed career criminal statute defining felony conviction to exclude conviction, if it has been expunged or set aside or if defendant has been pardoned or has had civil rights restored; full restoration is not required. 18 U.S.C.A. § 921(a)(20).

[6] CRIMINAL LAW ⇐ 1202.16(1)
110k1202.16(1)
Massachusetts felony convictions could not be counted in sentencing defendant as armed career criminal for possession of rifles and shotguns as

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felon, since defendant's civil rights in Massachusetts were substantially restored and Massachusetts has not expressly prohibited defendant from shipping, transporting, possessing or receiving rifles or shotguns; Massachusetts defined "firearm" as limited to handgun and allowed felon, after five-year waiting period, to obtain firearm identification card, purchase shotgun or rifle, possess handguns, rifles, or shotguns at home, or carry rifles or shotguns upon his person or in car. 18 U.S.C.A. §§ 921(a)(3, 20), 922(g)(1), 924(e); M.G.L.A. c. 140, §§ 121, 129B, 131, 131A.

[7] CRIMINAL LAW ⇐ 1202.3(1)
110k1202.3(1)
If state law prohibits shipping, transporting, possessing, or receiving firearms as defined by federal law, then felony conviction qualifies as predicate for sentencing as armed career criminal. 18 U.S.C.A. §§ 921(a)(20), 924(e).

[8] CRIMINAL LAW ⇐ 1202.16(1)
110k1202.16(1)
State felony conviction which has been expunged or set aside or for which defendant has been pardoned or has had civil rights restored is not felony conviction for purposes of federal statute prohibiting felon from possessing firearms. 18 U.S.C.A. §§ 921(a)(20), 922(g).

[9] WEAPONS ⇐ 4
406k4
Defendant's civil rights were never restored following federal felony conviction, since he was disqualified from serving on federal jury, and, thus, defendant remained felon prohibited from possessing firearms; restoration of civil right to serve on federal jury requires affirmative act recognized in law with respect to the specific felon. 18 U.S.C.A. §§ 921(a)(20), 922(g); 28 U.S.C.A. § 1865(b).

Owen S. Walker, Federal Defender Office, Boston, MA, for defendant.

Brian T. Kelly, United States Attorney's Office, Strike Force Division, Criminal, Boston, MA, for U.S.

MEMORANDUM AND ORDER

YOUNG, District Judge.

I. PROCEDURAL BACKGROUND

On February 10, 1994, Gerald R. Caron ("Caron") was indicted in this Court for various violations of 18 U.S.C. § 922(g)(1), all stemming from his status as a federally-defined "felon" in possession of firearms. At his trial [FN1] the jury found Caron guilty of four counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). [FN2] After conviction, this Court sentenced Caron to 262 months in a federal penitentiary pursuant to the Firearms Owners' Protection Act, Pub.L. No. 99-308, § 104(a)(4), 100 stat. 449, 456 (1986) (codified as amended at 18 U.S.C. § 924[e]), one of the myriad variations of the popular "three strikes and you're out" policy. [FN3] In United States v. Caron, 64 F.3d 713, 715 (1st Cir.1995) (Caron I), the United States Court of Appeals for the First Circuit affirmed this conviction, but granted a limited rehearing en banc, Caron I, 64 F.3d at 719, to consider whether certain of Caron's prior felony convictions properly could be counted as predicate crimes for the purpose of sentencing him as an Armed Career Criminal in view of the third sentence of 18 U.S.C. § 921(a)(20) [FN4] which provides specifically that:

> [a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction ... unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (emphasis added).

In United States v. Caron, 77 F.3d 1 (1st Cir.) (Caron II) cert. denied, --- U.S. ----, 116 S.Ct. 2569, 135 L.Ed.2d 1085 (1996), the First Circuit sitting en banc reversed its earlier decision in United States v. Ramos, 961 F.2d 1003 (1st Cir.1992), and held that civil rights may be restored within the meaning of section 921(a)(20) by laws of general or *241 automatic application rather than by "focused, individualized, affirmative action." Caron II, 77 F.3d at 2 (citing Ramos, 961 F.2d at 1009). [FN5] The First Circuit also held that "the fact that one civil right was never lost did not prevent an individual from 'having had civil rights restored' " within the meaning of section 921(a)(20), id., and remanded the case to this Court for resentencing in accordance with its opinion.

[1] Caron II does not purport to answer all the questions that necessarily arise upon the resentencing. Specifically, the First Circuit instructed this Court to determine (1) whether Caron's right to sit on a Massachusetts jury had not been sufficiently restored, or (2) whether Massachusetts law contains an express provision against ex-felons possessing firearms, id. at 6, [FN6] such that Caron ought still be sentenced as an armed career criminal, i.e. pursuant to 18 U.S.C. § 924(e)(1). The parties have briefed these issues and the Court has heard argument thereon. The government continues staunchly to maintain that Massachusetts statutes do not completely restore a felon's civil right to serve on a jury and, in any event, expressly restrict their right to possess firearms. [FN7] Government's Resentencing Memorandum at 2.

FN1. The facts as revealed in trial are that on July 14, 1993, Caron was apprehended by the police. He was intoxicated and holding a rifle with his finger on the trigger while talking with a woman. At that time, police seized a .22 caliber rifle and 185 rounds of ammunition. On December 1, 1993, police and agents from the department of Alcohol, Tobacco, and Firearms raided Caron's house and seized six rifles and shotguns and 6,823 rounds of ammunition.

FN2. Title 18 U.S.C. § 922(g)(1) states that it is unlawful for any person: who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition ... which had been shipped or transported in interstate or foreign commerce. 18 U.S.C. § 922(g)(1).

FN3. Section 924(e) states, in relevant part: In the case of a person who violates section 922(g) ... and has three previous convictions ... for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g). 18 U.S.C. § 924(e)(1). Sentencing enhancements under this provision are commonly referred to as being the sentencing of an armed career criminal. As a younger man, Caron had offended against the laws of four separate sovereigns: a New Hampshire misdemeanor conviction for possessing burglarious instruments, three Massachusetts felonies involving breaking and entering, a California conviction of attempted murder, and three federal firearms convictions within this District arising out of the same incident. Pre-Sentence Report ¶¶ 57-89 (Aug. 31, 1994). His last conviction prior to the present case took place in 1979. United States v. Caron, 615 F.2d 920 (1st Cir.1980) (affirming earlier conviction and holding defendant's appeal frivolous).

FN4. Section 921(a)(20) was enacted in the Firearm Owners' Protection Act, Pub.L. No. 99-308, § 101(5), 100 Stat. 449, 449-50 (1985).

FN5. This holding brought the law of this circuit into sync with that of seven other circuits, see Caron II, 77 F.3d at 2 & n. 1 and cases cited therein.

FN6. The First Circuit's focus on Massachusetts law makes sense, even though Caron has been convicted of felonies in the courts of California and the United States as well. This is so because the California felony convictions resulted from one incident and the United States convictions from another. That's two. Section 924(e)(1) requires convictions stemming from violent felonies on three separate occasions. Should the Massachusetts' convictions not count, therefore, resentencing at a lower range is mandatory. As will be seen, however, analysis of Massachusetts law alone is insufficient to establish the framework for resentencing.

FN7. This Court notes at the outset that there is no individual right to possess firearms, nor is possession of a firearm a civil right. See United States v. Warin, 530 F.2d 103, 106-07 (6th Cir.), cert. denied, 426 U.S. 948, 96 S.Ct. 3168, 49 L.Ed.2d 1185 (1976); Thomas v. The Members of the City Council of Portland, 730 F.2d 41, 42 (1st Cir.1984) (holding that established case law clearly grants no federal constitutional right to carry a concealed weapon); United States v. Kozerski, 518 F.Supp. 1082, 1090 (D.N.H.1981) (holding that the

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right guaranteed by the Second Amendment is a collective right to bear arms rather than an individual right).

II. ANALYSIS OF MASSACHUSETTS LAW

A. Restoration of Caron's Right to Sit on a Jury in Massachusetts

[2] Although the First Circuit's holding in Caron II is dispositive of the general issue of how state and federal law may affect the restoration of Caron's civil rights with respect to his Massachusetts convictions, the specific issue of whether his right to serve on a jury has been fully restored is one of Massachusetts law, as section 921(a)(20) expressly provides, "[w]hat constitutes a conviction ... shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." Beecham v. United States, 511 U.S. 368, ----, 114 S.Ct. 1669, 1670, 128 L.Ed.2d 383 (1994) (referring to this clause as "the choice-of-law clause"); see Caron II, 77 F.3d at 6; United States v. Cassidy, 899 F.2d 543, 545-46 (6th Cir.1990) (construing 18 U.S.C. § 921[a][20] and holding that Congress clearly "intended that courts refer to state law to determine whether an individual should be subject to federal firearms disabilities by virtue of a criminal conviction"). As noted by the First Circuit in Caron II, civil rights, as referred to within the meaning of section 921(a)(20), comprise the right to vote, the right to seek and hold public office, and the right to serve on a jury. See Caron II, 77 F.3d at 2 (citing Cassidy, 899 F.2d at 549).

In the Commonwealth, a convicted felon's right to vote is guaranteed by law and can never be taken away. See Mass.Gen.Laws Ann. ch. 54, §§ 86, 103B (West 1991); see also Cepulonis v. Secretary of the Commonwealth, 389 Mass. 930, 937-38, 452 N.E.2d 1137 (1983). Convicted felons do, however, lose their right to hold public office, but only during the period of their incarceration. See Mass.Gen.Laws Ann. ch. 279, § 30 (West 1981). Neither of these first two civil rights *242 is at issue, since they do not apply to Caron: he never lost his right to vote, and he regained his right to seek and hold public office following his release from prison. [FN8]

FN8. To be sure, there are other restrictions placed on convicted felons in Massachusetts. For example, a felon cannot be a police officer, Mass.Gen.Laws Ann. ch. 41, § 96A (West 1994); be appointed as an inspector of public safety, Mass.Gen.Laws Ann. ch. 22, § 6A (West 1994); or become a corrections officer or be involved with any position involving the regulation of a correctional facility, Mass.Gen.Laws Ann. ch. 125, § 9 (West 1991). Massachusetts also bars convicted felons from applying for a liquor license, Mass.Gen.Laws Ann. ch. 138 § 15 (West 1991); selling ammunition, Mass.Gen.L. ch. 140, § 122B (West 1991); and operating a driving school, Mass.Gen.Laws Ann. ch. 90, § 32G (West 1989). These restrictions, although onerous, do not amount to a loss of civil rights as defined by Caron II, and so are not considered here.

[3] The status of the third right, the right to serve on a jury, is less clear. In Massachusetts, a felon is disqualified from service as a juror until seven years have passed since the conviction. Mass.Gen.Laws Ann. ch. 234A § 4(7) (West 1986) (grounds for disqualification from juror service). On its face, chapter 234A appears to be a "law of general or automatic application" as referred to by the First Circuit in Caron II, 77 F.3d at 2, since it allows for the passive restoration of the right to serve on a jury after the seven year time period has elapsed. Thus, this civil right is restored without any "affirmative, individualized" state action. Caron II, of course, reversed Ramos, 961 F.2d at 1009 (holding that "individualized official judgment" is necessary as evidence of the state's "renewed trust" in the individual in order to restore a felon's civil rights under 18 U.S.C. § 921[a][20]).

[4] The Court takes judicial notice of the judicial procedures of the Commonwealth to implement Mass.Gen.L. ch. 234A, § 4(7). Fed.R.Evid. 201. The juror questionnaire propounded by the Commonwealth's Jury Commissioner asks whether one has been convicted of a felony. [FN9] Where there is an affirmative response, the Office of the Jury Commissioner checks the date of conviction and, for seven years thereafter, deletes the individual from the roster of individuals summoned for service to the various courthouses of the Commonwealth. Thereafter, however, the individual's response to the questionnaire is forwarded for service along with those of all other eligible jurors.

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FN9. See question 3, reason code 07 to Massachusetts' Confidential Juror Questionnaire, reprinted in full in 1 William G. Young, Juries, Judges and Judging 123-24 (MCLE 1996).

Under Mass.Gen.L. ch. 234, § 8, however, a justice may relieve a person who has been convicted of any felony from a jury panel solely on the basis of the prior felony conviction.

> If a person whose name has been so placed in the jury box has been convicted on any felony, ... or is found by the justice holding court to be unqualified or unfit to serve as a juror, he may be relieved by said justice from sitting in any case, or his name ordered by the justice to be stricken from the jury list.

Mass.Gen.Laws Ann. ch. 234, § 8 (West 1986) (emphasis added). Under Massachusetts law, therefore, justices of the Commonwealth may, but are not required to, exclude individuals with criminal records from the venire based on their criminal records. See, e.g., Commonwealth v. Amazeen, 375 Mass. 73, 82-83, 375 N.E.2d 693 (1978) (holding that the trial court did not err in excusing a juror previously sentenced to six months in jail); Commonwealth v. Martin, 357 Mass. 190, 191, 257 N.E.2d 444 (1970) (holding that trial justice's dismissal of six veniremen without examination on the basis of their prior criminal records did not deprive defendant of a fair jury); but see Commonwealth v. Wong Chung, 186 Mass. 231, 234, 71 N.E. 292 (1904) (holding that a record of conviction of a crime does not necessarily disqualify one from serving as a juror and noting "it is not the law that persons convicted of a crime shall be permanently deprived of their civil rights").

The convergence of these two statutes establishes the following peculiar situation: a convicted felon as to whom the requisite amount of time since conviction has passed and who is otherwise qualified to serve as a juror may nonetheless be stripped of his civil *243 right to sit on a jury--a right which had been restored to him automatically by act of law--by the justice holding court, acting pursuant to powers granted by statute. Because of the power granted to trial justices pursuant to section 8 of chapter 234, what exists in this Commonwealth is not the full restoration of a felon's civil right to sit on a jury but--to borrow a term from the law of real property--merely a civil right to sit on a jury subject to defeasance.

Addressing Caron's impaired right to serve on a jury, the government--predictably--contends that since felons like Caron can never fully regain their right to sit on a jury in Massachusetts, they can not have complete restoration of their civil rights within the meaning of 18 U.S.C. § 921(a)(20). [FN10] The government asserts that "an impaired right to serve on a jury indicates that a felon's rights have not been restored." Government's Resentencing Memorandum at 9. As support for this latter assertion, the government relies upon "numerous" decisions throughout the country. See United States v. Essig, 10 F.3d 968, 975-76 (3rd Cir.1993), reh'g denied, January 5, 1994; United States v. Metzger, 3 F.3d 756, 759 (4th Cir.1993), cert. denied, --- U.S. ----, 114 S.Ct. 1374, 128 L.Ed.2d 50 (1994); United States v. Driscoll, 970 F.2d 1472, 1478-79 (6th Cir.1992), cert. denied, 506 U.S. 1083, 113 S.Ct. 1056, 122 L.Ed.2d 362 (1993); Presley v. United States, 851 F.2d 1052, 1053 (8th Cir.1988); Berger v. United States, 867 F.Supp. 424, 427 (S.D.W.Va.1994).

FN10. This Court notes with interest a recent decision from the District of New Hampshire, United States v. Estrella, Crim. No. 95-81-01-JD (D.N.H. Apr. 3, 1996) (DiClerico, C.J.), which was decided shortly after the First Circuit's Caron II decision reversing Ramos. Oddly enough, in Estrella--a case factually very similar to the case at bar--the government conceded the very point that they now contest, namely that, as matter of Massachusetts statutory law, the defendant's right to sit on a jury substantially had been restored as of the date of the federal offense. Estrella, Crim. No. 95-81-01-JD at 5 (D.N.H. Apr. 4, 1996).

The government's reliance is misplaced. In Essig, the Third Circuit held that restoration of a felon's civil rights was not complete where Pennsylvania law disqualified a citizen from serving on a jury if he "has been convicted of a crime punishable by imprisonment for more than one year and has not been granted a pardon or amnesty therefor." Essig, 10 F.3d at 975 (quoting 42 Pa.Cons St.Ann. § 4502[3] [1981]). Although the felon in Essig never lost the right to vote and retained the right to hold public office, the Third Circuit held that the retention of two of the three core civil rights did not amount to full restoration of civil rights within the meaning of section 921(a)(20). Unlike Mass.Gen.L. ch. 234A § 4(7), however, the

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Pennsylvania juror-disqualification statute provided no vehicle short of a full pardon or amnesty through which a convicted felon could regain the right to serve on a jury. Massachusetts provides such a vehicle after seven years have passed, regardless of whether or not a pardon has issued. See Mass.Gen.Laws Ann. ch. 234A, § 4(7) (West 1986).

Similar to the Third Circuit's holding in Essig, supra, the courts in Presley, 851 F.2d at 1053 and Berger, 867 F.Supp. at 430, concluded that a felon's civil rights were not substantially restored because state law permanently disqualified ex-felons from service as a juror. Missouri's juror-disqualification law, at issue in Presley, stated that "a person who is convicted ... of any felony shall be forever disqualified from serving as a juror." Mo.Rev.Stat. § 561.026(3) (emphasis added), cited in Presley, 851 F.2d at 1053. The Presley court held that this law, coupled with other limitations on holding public office and on obtaining public employment, precluded substantial restoration of a felon's civil rights as defined in 18 U.S.C. § 921(a)(20). Presley, 851 F.2d at 1053. In Berger, the court analyzed West Virginia's juror-disqualification law and concluded that since the law was not limited to the period of time that the person was incarcerated, a felon's right to serve on a jury "was permanently lost as a result of his [felony conviction]." Berger, 867 F.Supp. at 430 (interpreting W.Va.Code § 52-1-8). Thus, the juror-disqualification statutes of both Missouri and West Virginia, as well as that of Pennsylvania, differ from Mass.Gen.L. ch. 234A, § 4(7) in that a person convicted of a felony in any of those states does not regain the civil right to serve on a *244 jury unless pardoned or granted amnesty. This fact, which differs from the law and the practice of Massachusetts, proved to be the basis for the courts' conclusion that a released felon's civil rights could never substantially be preserved or restored as contemplated by Congress in enacting section 921(a)(20).

The two cases analyzing Michigan law, Metzger and Driscoll, are most similar to the case at bar and concluded that a felon's civil rights were not restored upon release from prison where the right to serve on a jury was impaired. Metzger, 3 F.3d at 759; Driscoll, 970 F.2d at 1478-79. In both Metzger and Driscoll, the defendants contended that their civil rights, which had been revoked upon conviction for a Michigan felony, had been restored under Michigan law upon their release. Metzger, 3 F.3d at 757; Driscoll, 970 F.2d at 1474. Michigan's juror-disqualification statute disqualifies from jury service anyone "under sentence for a felony at the time of jury selection." Mich.Comp.Laws Ann. § 600.1307a(1)(e) (West 1981). Although other courts had interpreted section 600.1307a(1)(e) as automatically restoring a felon's right to serve as a juror upon completion of his sentence, see United States v. Dahms, 938 F.2d 131, 134 (9th Cir.1991); United States v. Gilliam, 778 F.Supp. 935, 937 (E.D.Mich.1991), rev'd, 979 F.2d 436 (6th Cir.1992), cert. denied, 507 U.S. 1034, 113 S.Ct. 1856, 123 L.Ed.2d 478 (1993), the Metzger and Driscoll courts rejected those interpretations, holding that the Michigan Court Rules made a felony conviction grounds for an automatic for-cause challenge to a prospective juror and thus impaired the juror's right to serve on a jury. See Metzger, 3 F.3d at 759 (relying upon Mich.Ct.R. 2.511[D][2] [1991]); Driscoll, 970 F.2d at 1478-79 (same). Like the Driscoll majority, the Metzger court also found instructive the fact that the Michigan Court Rules "directed--although they did not require--Michigan courts to excuse convicted felons sua sponte from jury panels in criminal cases once that ground for exclusion was established." Metzger, 3 F.3d at 759 (citing Mich.Ct.R. 6.412[D][2]). [FN11]

> FN11. Specifically, Mich.Ct.R. 6.412(D)(2) provides that If, after the examination of any juror, the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel.
>
> Mich.Ct.R. 6.412(D)(2) (emphasis added). In reaching its decision that Michigan did not fully restore a felon's civil right to serve on a jury, the Driscoll court noted that the combined effect of Mich.Ct.R. 2.511(D)(2) and 6.412(D)(2) was to require "a court to excuse a juror whenever a challenge for cause clearly falls within one of the enumerated grounds," Driscoll, 970 F.2d at 1479 (quoting People v. Lamar, 153 Mich.App. 127, 134-35, 395 N.W.2d 262 [1986]); see also People v. Badour, 167 Mich.App. 186, 189, 421 N.W.2d 624 ("If a party shows that a prospective juror comes within one of this court rule's enumerated categories, the trial court is without discretion to retain the juror, who must be excused for cause") (citation omitted), and concluded that "[under Michigan law, a felon] would be automatically dismissed from jury service once either party brought his former conviction to the attention of the court in either a civil or criminal case." Driscoll, 970 F.2d at 1479. Furthermore, the Driscoll court observed that "in a criminal case, Michigan court rules recommend that the trial court dismiss convicted felons on its on [sic] motion." Id.

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The discretion afforded trial judges in Michigan under Mich.Ct.R. 6.412 [D][2] that is discussed in Metzger and Driscoll differs from that afforded trial justices in Massachusetts under Mass.Gen.L. ch. 234, § 8. The crucial distinction between the Michigan cases and the case at bar rests upon the subtle difference in the language of the Michigan Court Rules and the corresponding case law and language of sections of chapter 234. Section 8 specifically states that if a person has been convicted of any felony or is deemed to be otherwise unfit for jury service, "he may be relieved by [the court] from sitting in any case." Mass.Gen.Laws Ann. ch. 234, § 8 (West 1986). Unlike the state of the law in Michigan, a thorough search of relevant Massachusetts statutes, case law, and rules of court does not disclose any instruction to Massachusetts trial justices that requires them to dismiss persons whose past felonies are disclosed after the seven-year time period has passed. Rather, the trial justice "may" relieve a person from jury service, but the justice is not forced to do *245 so. [FN12] Likewise, disclosure of a prior felony conviction is not a ground for a mandatory challenge for cause in a civil or criminal case. Thus, Metzger and Driscoll do not here control.

> FN12. Absent from this discussion, of course, is any sense of what trial justices in Massachusetts actually do when confronted by the fact that a person with a felony conviction more than seven years old shows up on a jury venire. No Massachusetts practice treatise or continuing legal education pamphlet addresses the matter so far as I am aware. I do remember what I used to do when I served as a Justice of the Superior Court in the years prior to the enactment of Mass.Gen.Laws ch. 234A and the advent of the "one day or one trial" jury system. In those days, were I the jury judge and were the matter brought to my attention, it was my unvarying practice to excuse the felon juror. Of course, if this is presently the general practice among the justices in the jury sessions of the Massachusetts Superior, District, Housing, and Juvenile Courts, then Metzger and Driscoll are persuasive authority indeed. But a personal practice nearly two decades out-of-date is a poor guide for decision making today. This is especially so inasmuch as I recall no discussion of the matter among my Superior Court colleagues, nor can I recall any specific instance of granting (or denying) a specific challenge for cause on this ground in eight years of service on the Superior Court. Still, as juror challenges are matters of record, it is at least theoretically possible to ascertain a pattern or policy in acting on such challenges in the jury sessions of the various Massachusetts trial courts. Indeed, the creation of electronic data bases that will retain and permit the search and retrieval of such data are possible today in every court session where the court reporter uses computer assisted transcription. This case presents a clear example of the need for such data bases so that the law can consistently be applied on the basis of what courts actually do. See Panel Discussion, "Lawyers Online: Discovery, Privilege and the Prudent Practitioner," Internet Law Symposium, Boston University, June 20, 1996 (to be published in the Boston University Journal of Science and Technology Law). Unfortunately, due to inadequate funding, Massachusetts continues merely to tape record many of its trial sessions, thus frustrating any such analysis as a practical matter. For related problems with tape recording, see generally Commonwealth v. Tavares, Cr. No. JC-8725-188, 40 Mass.App.Ct. 1110, 662 N.E.2d 1063 (Mass.Super.Ct. March 24, 1995) (O'Neill, J.) (conviction set aside due to inadequate record); United States v. Payne, 894 F.Supp. 534, 537 n. 7 (D.Mass.1995) (noting this problem may be endemic); United States v. One Ford 198X Mustang, Vehicle Identification No. 1FAB42E5JF290177, 749 F.Supp. 324, 326 n. 1 (D.Mass.1990) (collecting cases noting problems in appellate review based on tape recordings).

In sum, the Massachusetts' juror-disqualification statute is not permanent in nature, for felons regain the opportunity to serve on a jury seven years after conviction. While trial justices in Massachusetts are afforded the discretionary authority to excuse a convicted felon from jury service even after the seven-year redemption period has passed, they are

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not required to do so. How, then, is Caron to be treated? He is a Massachusetts felon who, having regained his opportunity to serve on a jury, may nonetheless be excused by a trial justice and stripped of his right to serve as a juror as part of a particular venire. Have his civil rights been restored under 18 U.S.C. § 921(a)(20)?

B. Is Full Restoration or Only Substantial Restoration Required?

[5] The seminal case on this issue is the Sixth Circuit's opinion in Cassidy, where the court wrote

> Our review of the legislative history has not produced a precise statement from Congress identifying the rights that must be restored by a state in order for it to have effected a "restoration of civil rights" for purposes of § 921(a)(20). We are confident, however, based on the general intent of Congress to redirect enforcement efforts against firearms owners that have a demonstrated potential for serious unlawful activity, that Congress envisioned a restoration of more than a de minimis quantity of civil rights. We do not read into the statutory language, however, a requirement that there be a "full" restoration of rights. If Congress had intended a requirement of a complete restoration of all rights and privileges forfeited upon conviction, it could easily have so stated.

Cassidy, 899 F.2d at 549 (footnote omitted). Although the felon in Cassidy received his rights to vote, to seek and hold public office, and to serve on a jury after his release from prison, the Cassidy opinion did not discuss the extent to which the right to serve on a jury had been restored. Among the cases that do address situations where a felon's ***246** right to serve on a jury is precluded by state statutes or rules of court, however, the operative language from Cassidy still applies. See, e.g., Metzger, 3 F.3d at 759 (ruling that barriers to jury service raised by state rules of court preclude a finding of a substantial restoration of civil rights necessary to satisfy § 921[a][20]); Driscoll, 970 F.2d at 1476 ("the restoration 'must be substantial, but need not be complete' ") (quoting Dahms, 938 F.2d at 133); United States v. Gomez, 911 F.2d 219, 221 (9th Cir.1990) ("There need not be a 'full' restoration of rights.") (quoting Cassidy, 899 F.2d at 549); Presley, 851 F.2d at 1053 (affirming district court's holding that "Congress intended substantial, not total, restoration of civil rights in order to qualify for the exclusion [contained in 18 U.S.C. § 921(a)(20)]"); Berger, 867 F.Supp. at 427 ("To render a prior conviction unavailable for consideration in accordance with the civil rights restoration provision of section 921[a][20], the restoration of civil rights need not be complete, 'but it must be substantial.' ") (quoting Metzger, 3 F.3d at 758) (other citations omitted).

This Court follows Cassidy and its progeny and rules that, in the case at bar, Caron's right to serve on a jury substantially has been restored. Since more than seven years have elapsed with respect to each of the prior convictions that figure in his present sentence, he may be summoned for jury service within his county of residence in the ordinary course. Like any other citizen, he will, in random selection, be empaneled unless either excused by the justice presiding due to his felon status or successfully challenged by a litigant. Indeed, even if excused by the justice presiding, it appears that Caron would be credited like any other juror for having appeared in response to his summons and would thus be exempted--as a serving juror--from further call by the Commonwealth for the succeeding three years. See Mass.Gen.Laws Ann. ch. 234, § 2 (West 1985). Thus, Caron's right to sit on a Massachusetts jury, as well as his other material civil rights, substantially have been restored. [FN13]

> FN13. In this conclusion, this Court respectfully disagrees with the decision of the Ninth Circuit in United States v. Oman, 91 F.3d 1320 (9th Cir.1996).

C. Massachusetts Firearms Restrictions

1. The Exception to the Exception

[6] In 1986, the Firearm Owners Protection Act, Pub.L. 99-308, § 101(5) (1986), specifically defined "crime punishable by imprisonment for a term exceeding one year" in 18 U.S.C. 921(a)(20) by the following language that is here material:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20); see also United States v. Kolter, 849 F.2d 541, 543 (11th Cir.1988) (discussing the history of the Firearm Owners Protection Act).

The language of this paragraph of section 921(a)(20) can best be understood as follows: the first clause of the second sentence of the above paragraph--the "shall not" clause--which begins with the words "Any conviction" and ends with the phrase "purposes of this chapter" creates an exception to the statutory definition of "conviction." The second clause of the second sentence, beginning with the word "unless" and ending with "firearms," carves out an "exception to the exception." Both clauses, read together, inter alia, serve to eliminate the sentence-enhancing effect of a felony conviction if the state of conviction determines that the felon shall be made whole, with the proviso that if the state limits the felon's access to firearms in particular ways, the felon's predicate crimes may be counted for the purposes of determining the length of sentence under 18 U.S.C. §§ 922(g)(1) or 924(e). See Cassidy, 899 F.2d at 546. As Massachusetts is Caron's state of conviction with respect to this aspect of the analysis, Massachusetts law must be considered to determine whether Caron is ***247** subject to the requisite federal firearms restrictions by virtue of his previous criminal convictions. Id.; see also Driscoll, 970 F.2d at 1480 (holding that "in cases involving 18 U.S.C. § 922[g][1], federal courts should examine state law solely for the purpose of determining whether the state has restored felons to their full civil rights, including allowing them to possess firearms").

Thus, under the second branch of the two-pronged analytical framework propounded in Cassidy and Dahms, Caron's earlier predicate crimes may still count pursuant to section 921(a)(20)--despite the substantial restoration of his civil rights--if Massachusetts law "expressly provides that [Caron] may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20); Dahms, 938 F.2d at 133; Cassidy, 899 F.2d at 549. If Massachusetts law so provides, then Caron's prior felony convictions must be counted against him, and Caron is therefore subject to the special punishment ordered by Congress in section 924(e)(1) for a felon who possesses a firearm despite three prior felony convictions. See United States v. Erwin, 902 F.2d 510, 511 (7th Cir.), cert. denied, 498 U.S. 859, 111 S.Ct. 161, 112 L.Ed.2d 127 (1990). In other words, this Court must sentence Caron as an armed career criminal.

Although Congress' primary concern was to look to state law in order to determine convicted felon status under section 921(a)(20), Cassidy, 899 F.2d at 548 & 549 n. 11, it is here necessary to determine whether the two jurisdictions--Massachusetts and the United States--speak as one with respect to limiting felons' access to firearms. A thorough review of Massachusetts and federal case law, statutory authority, and legislative history indicates that, as a threshold matter, Massachusetts law is not coextensive with federal law in limiting felons' access to firearms, given the differences in the two jurisdictions' definition of "firearm" and the practical effect of Massachusetts weapons licensing statutes. [FN14].

> FN14. For this reason, the Court finds the government's reference to United States v. Bendolf, Crim. No. 95-68-LON (D.Del. Aug. 20, 1996) unpersuasive. The key to the analysis in Bendolf is its assumption that the term "firearm" as used in the Massachusetts statutes means the same thing as it does under section 921(a)(20). See Bendolf, slip op. at 13. Because this Court respectfully differs with that assumption, it is not moved by the Bendolf analysis.

2. Federal Definition of "Firearm"

Congress adopted Title IV of the Omnibus Crime Control and Safe Streets Act, Pub.L. No. 90-351, 82 Stat. 197 (1968) (relevant provisions of which were codified at 18 U.S.C. §§ 921-928, 1201-1203) (later amended by The Gun Control Act of 1968, Pub.L. No. 90-618, 82 Stat. 1213 (1968) [relevant provisions of which were codified at 18 U.S.C. §§ 921-929] [hereinafter, as amended, the "Gun Control Act"]), the precursor to modern-day federal firearms-possession statutes, in order to "keep firearms out of the hands of those not legally entitled to possess them." S.Rep. No. 1097, 90th Cong., 2d Sess. 2-3 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2113-14. The term "firearm," as it pertains to all sections contained in Title 18 of

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the United States Code--including section 921(a)(20)--is defined broadly as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. [FN15] Such term does not include an antique firearm.

> FN15. The definition of the term "destructive device" is provided in section 921(a)(4).

18 U.S.C. § 921(a)(3). The term "weapon" is not defined in the federal statutes.

Under the plain language of this statute a "firearm" is a specific type of weapon, i.e. a subset of the array of items society uses as weapons. Congress meant the term "firearm" to include the entire subset of weapons which can fire, or be made to fire, a projectile out of a barrel with the aid of a propellant, with the specific exclusion of antique firearms, which are defined in another part of section 921(a). Thus, while brass knuckles, black jacks, shivs, knives, swords, spears, ***248** lances, arrows, slings, catapults, and ballistas are weapons, they are not firearms. Likewise, crew-served weapon systems such as tanks and artillery are both weapons and firearms. Bazookas are probably firearms; rockets and missiles probably are not. More to the point, long arms such as "rifles" and "shotguns," although defined separately in section 921(a), have been held to be within the statutory definition of "firearm," United States v. Mitchell, 557 F.2d 1290, 1291-92 (9th Cir.1977) ("Congress, by using the comprehensive term 'firearm' without qualification, did not intend to remove rifles and shotguns from the reach of [18 U.S.C. § 922(h)]"), [FN16] as are "handguns" and "semiautomatic assault weapons." See 18 U.S.C. §§ 921(a)(29) and 921(a)(30).

> FN16. In Mitchell, the defendant attempted to argue that since Congress distinguished rifles and shotguns from other firearms in another section of the federal gun control statute, 18 U.S.C. § 922(b)(1), it meant that distinction to apply to his alleged violation of 18 U.S.C. § 922(h) as well. Mitchell, 557 F.2d at 1291. The Ninth Circuit rejected his argument. Prior to being amended in 1986, 18 U.S.C. § 922(h) provided that it was unlawful for four categories of persons, including a convicted felon, "to receive any firearm or ammunition which has been shipped or transported in interstate commerce." 18 U.S.C.A. § 922(h) (West 1976). Section 922(b)(1) prohibits licensed importers, manufacturers, dealers, or collectors from selling or delivering "any firearm or ammunition ... other than a shotgun or rifle, or ammunition for a shotgun or rifle" to any individual under 21 years old. 18 U.S.C. § 922(b)(1).

The term "firearm" is so liberally defined that it has been held to include even unloaded, inoperable weapons. United States v. Gutierrez-Silva, 983 F.2d 123, 125 (8th Cir.1993); United States v. Sanza, 519 F.Supp. 26, 28 (D.Md.1980). Therefore, based upon the Ninth Circuit's holding in Mitchell and the unambiguous, all-inclusive language of 18 U.S.C. § 921(a)(3), this Court interprets Congress' reference to the term "firearm" in section 921(a)(20) to mean the entire set of weapons including, but not limited exclusively to, all such weapons as longarms and handguns.

3. Massachusetts' Definition of "Firearm"

Quite unlike the federal government, Massachusetts but narrowly defines the term "firearm." Under Massachusetts law, the term "firearm" as it applies to all state gun-control statutes is defined as

> A pistol, revolver or other weapon of any description loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than sixteen inches or eighteen inches in the case of a shotgun as originally manufactured....

Mass.Gen.Laws Ann. ch. 140, § 121 (West 1991). Section 121 also separately defines "rifle," "shotgun," "sawed-off shotgun," and "machine gun" as weapons with varied individual characteristics. Id. (applying definitions to Mass.Gen.L. ch. 140, §§ 122-131F). The term "weapon" is not defined.

Based upon this definition of firearm, it appears that firearms in Massachusetts, although classified as a subset of a larger group of weapons, generally comprise a particular type of weapon: those weapons with a barrel length of less than sixteen inches, i.e., hand guns. Furthermore, Massachusetts law--unlike federal law--draws a clear distinction between firearms (i.e., handguns) and

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rifles, shotguns, and machine guns, separately defining each into mutually exclusive subsets of the general array of weapons. For example, a "rifle" is defined as "a weapon having a rifled bore with a barrel length equal to or greater than sixteen inches," while a "shotgun" is "a weapon having a smooth bore with a barrel length equal to or greater than eighteen inches." Mass.Gen.Laws Ann. ch. 140, § 121 (West 1991). In fact, Massachusetts distinguishes between firearms (i.e. handguns) and rifles and shotguns in nearly every section of its firearms sale and licensing statute, codified at Mass.Gen.L. ch. 140, §§ 122-131F. See, e.g., Mass.Gen.L. ch. 140, §§ 122 (license requirements to sell weapons), 123 (conditions of licenses), 126 (signage requirements for gunsmiths), 128 and 128A (penalties for illegal sale or lease of weapons), 128B (unauthorized use of firearms), 129 (penalties for falsely declaring information).

***249** 4. The Difference Between the Federal and Massachusetts Regulatory Schemes; Effect on the Instant Case

[7] The difference between the federal definition of "firearm" and the corresponding Massachusetts definition is crucial. The federal statute, 18 U.S.C. § 922(g)(1), prohibits firearms possession by a felon, and section 924(e) enhances the sentence imposed for violating section 922(g) if the felon has three previous felony convictions. According to section 921(a)(20), however, a prior felony conviction is not a conviction if, inter alia, the state of conviction restores the felon's civil rights, unless that state expressly restricts the felon's access to "firearms." Thus, if state law prohibits the "ship[ping], transport[ing], possess[ion], or recei[pt]" of the range of weapons referred to in the federal definition of "firearm," then the previous conviction qualifies, and the predicate offense may be counted toward the three offense total as specified in section 924(e).

Since there is a difference between Massachusetts' definition of "firearm" and the federal definition of "firearm," the real issue to be resolved in order to determine the range of Caron's sentence under the second prong of the Cassidy analysis is whether Massachusetts law restricts a felon's access to federal "firearms" to the degree intended by Congress when it drafted section 921(a)(20).

"The goal of firearms control legislation in Massachusetts is to limit access to deadly weapons by irresponsible persons." Ruggiero v. Police Comm'r, 18 Mass.App.Ct. 256, 258, 464 N.E.2d 104, review denied by, 392 Mass. 1104, 466 N.E.2d 522 (1984). This goal is accomplished through the implementation of a comprehensive regulatory scheme which requires aspiring gun owners potentially to obtain three separate documents--a firearm identification card, a license to carry, and a permit to purchase.

a. Firearm Identification Cards: Mass.Gen.L. ch. 140, § 129B

The issuance of firearm identification cards is governed by Mass.Gen.L. ch. 140, § 129B. According to section 129B, a felon is entitled to receive a firearm identification card if five years have passed since conviction or release from confinement:

> Any person ... may submit to the licensing authority [an] application for a firearm identification card, which such person shall be entitled to, unless the applicant (a) has within the last five years been convicted of a felony in any state or federal jurisdiction, or within that period has been released from confinement where such person was serving a sentence for a felony conviction....

Mass.Gen.Laws Ann. ch. 140, § 129B (West 1991) (emphasis supplied).

Firearm identification cards by themselves may be obtained as "matter of right." Commonwealth v. Landry, 6 Mass.App.Ct. 404, 406, 376 N.E.2d 1243 (1978). A valid firearm identification card, without any other documentation, allows the holder lawfully to own or possess a firearm (i.e. a handgun), rifle, or shotgun. See Mass.Gen.Laws Ann. ch. 140, § 129C (West 1991) (making it illegal for anyone other than a licensed dealer or "one who has been issued a license to carry a pistol or revolver" to own or possess any handgun, rifle, or shotgun without also possessing a firearm identification card); Mass.Gen.Laws Ann. ch. 269, § 10(a) (West 1991) (criminalizing possession of handguns, rifles, and shotguns without possessing a valid firearm identification card); see also Commonwealth v. Morse, 12 Mass.App.Ct. 426, 428, 425 N.E.2d 769 (1981); Landry, 6 Mass.App.Ct. at 405, 376 N.E.2d 1243 (finding

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that "a firearm identification card ... authorizes the holder to 'own or possess' a firearm," but remaining silent about rifles or shotguns) (citation omitted). Thus, in Massachusetts, felons such as Caron may obtain a firearm identification card, which in turn allows the holder lawfully to possess firearms (i.e. handguns), rifles, shotguns, and ammunition. [FN17]

FN17. Indeed, at Caron's trial, there was testimony to the effect that in June 1991, after learning that he was eligible for a firearm identification card--despite his status as a felon--Caron applied for and received a firearm identification card. Caron I, 64 F.3d at 714. He understood the state of the law in Massachusetts to be that possession of the firearm identification card permitted him to purchase and possess guns, albeit solely within the confines of his home or place of business. See id. In 1993, federal agents seized a .22 caliber rifle and 185 rounds of ammunition from Caron, and subsequently seized six additional rifles and shotguns and over 6,500 rounds of ammunition from his place of residence. Id.

*250 b. License to Carry Firearms: Mass.Gen.L. ch. 140, § 131

Individuals who qualify for a firearm identification card, however, may not lawfully carry a firearm (which is defined by Mass.Gen.L. ch. 140, § 131 as a handgun) on their person or under their control in a vehicle unless they also have a license to carry obtained under section 131 or are otherwise exempt from the licensing requirements. Mass.Gen.Laws Ann. ch. 269, § 10(a) (West 1990); see also Mass.Gen.Laws Ann. ch. 140, § 129C (West 1991) ("The possession of a firearm identification card issued under section [129B] shall not entitle any person to carry a firearm in violation of [ch. 269, § 10]."); Commonwealth v. Ramirez, 407 Mass. 553, 558, 555 N.E.2d 208 (1990) (citing Commonwealth v. Seay, 376 Mass. 735, 737, 383 N.E.2d 828 [1978]); Landry, 6 Mass.App.Ct. at 406, 376 N.E.2d 1243 (citing ch. 269, § 10[a]). This requirement comports with the intention of the Massachusetts Legislature. Landry, 6 Mass.App.Ct. at 406, 376 N.E.2d 1243 ("[T]he [Massachusetts] Legislature intended to condition the carrying of a firearm on compliance with the licensing requirements ... more stringent than those of G.L. c. 140, s. 129B"). The statutory restrictions on carrying rifles and shotguns are far more relaxed: valid firearm identification cardholders may carry a rifle or shotgun on their person or under their control in a vehicle. Mass.Gen.L. ch. 269, § 10(a)(4) subpar. (3); Landry, 6 Mass.App.Ct. at 406, 376 N.E.2d 1243. Valid firearm identification cardholders may, however, carry any firearm (i.e. handgun) within their residence or place of business without violating the law. Ramirez, 407 Mass. at 558, 555 N.E.2d 208; Seay, 376 Mass. at 742, 383 N.E.2d 828 (holding that Massachusetts licensing laws contain an implicit exemption from criminal liability for one who has a firearm identification card and carries a firearm within his residence or place of business).

Chapter 140, section 131 has been called a "first-line measure in [Massachusetts'] regulatory scheme." Ruggiero, 18 Mass.App.Ct. at 259, 464 N.E.2d 104. It governs the issuance of licenses to carry handguns. [FN18] Although any resident of the Commonwealth may apply for a license to carry, Massachusetts law explicitly states that convicted felons may not obtain such a license. The relevant language is as follows:

FN18. Chapter 140, section 131 is titled "License to carry or possess firearms." Both parties agreed at a hearing before this Court that section 131 applies only to handguns and not to shotguns and rifles. See Defendant's Note Concerning the Definition of "Firearm" as the Term is Used in G.L. c. 140, § 131 at 1. Caron was convicted of possessing rifles, shotguns and ammunition in violation of 18 U.S.C. § 922(g)(1). Caron II, 77 F.3d at 1.

> After [an investigation into the criminal record and mental history of the applicant] has been completed, [the issuing authority] may, except for ... a person who has been convicted of a felony ... issue to a person ... a license to carry firearms [i.e., handguns] in the commonwealth.

Mass.Gen.Laws Ann. ch. 140, § 131 (West 1991) (emphasis added). Convicted felons in Massachusetts are similarly prohibited from obtaining licenses "to sell, rent or lease firearms [i.e., handguns], rifles, shotguns or machine guns, or to be in business as a gunsmith," Mass.Gen.Laws Ann. ch. 140, § 122 (West 1991); obtaining licenses to sell ammunition, Mass.Gen.Laws Ann. ch. 140, § 122B (West 1991); [FN19] and

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retaining any licenses *251 granted pursuant to section 122, Mass.Gen.Laws Ann. ch. 140, § 125 (West 1991).

FN19. In United States v. Fortes, Crim. No. 95-10383-GAO (D.Mass. July 24, 1996) (supplemental ruling) (Doc. No. 72), Judge O'Toole ruled that under chapter 140, section 122, felons in Massachusetts were "permanently disqualified from being licensed to possess firearms" and thus the "restoration of civil rights" provision of section 921(a)(20) could not apply. This Court's analysis suggests otherwise. Respectfully, chapter 140, section 122 deals not with licenses to possess firearms but with licenses to "sell, rent or lease firearms, rifles, shotguns or machine guns." Mass.Gen.Laws Ann. ch. 140, § 122 (West 1991). As mentioned earlier, chapter 140, section 131 addresses the requirements for a license to carry firearms within the Commonwealth. "[F]irearms" as used in that statute refers solely to handguns, not shotguns or rifles. Like Estrella, the holding in Fortes may be reconciled with the holding in this case. Fortes had no firearms identification card, thus making his possession illegal under Massachusetts law. Caron, in contrast, had a firearms identification card and his conduct was entirely lawful under Massachusetts law.

c. Permits to Purchase Firearms: Mass.Gen.L. ch. 140, § 131A

Chapter 140, section 131A regulates the purchase of firearms, requiring persons who qualify for a license to carry a handgun under section 131 to apply for a permit before purchasing a handgun. Heavily dependent upon the strictures propounded in section 131, section 131A provides, in relevant part, the following:

> A licensing authority under [§ 131], upon the application of a person qualified to be granted a license thereunder by such authority, may grant to such a person, ... a permit to purchase, rent or lease a firearm [i.e., handgun] if it appears that such purchase, rental or lease is for a proper purpose, and may revoke such permit at will.

Mass.Gen.Laws Ann. ch. 140, § 131A (West 1991). See also generally Ruggiero, 18 Mass.App.Ct. at 257, 464 N.E.2d 104; Commonwealth v. Sampson, 383 Mass. 750, 758, 422 N.E.2d 450 (1981) (explaining role of § 131A permits in Massachusetts gun regulatory scheme); Commonwealth v. Seay, 376 Mass. 735, 740-41, 383 N.E.2d 828 (1978) (explaining Massachusetts gun licensing laws).

Under the statutes of this Commonwealth, therefore, a felon, provided the requisite five-year waiting period has expired and as long as he does not traffick in firearms as defined under Massachusetts law, is able to: (1) obtain a firearm identification card pursuant to Mass.Gen.L. ch. 140, § 129B; (2) purchase a shotgun or rifle since the constraint on obtaining a permit to purchase under chapter 140, § 131A applies only to handguns; (3) possess handguns, rifles, or shotguns at his home; and (4) carry rifles or shotguns upon his person or in his car. Under federal statutes, if the felon were to attempt the latter three acts with any firearm of any sort--rifle, shotgun, or handgun--he could (if other requirements are met, see section D, below) be convicted under section 922(g)(1). Yet, under the gun laws of the Commonwealth of Massachusetts, the felon's actions are perfectly legal.

As applied to this case, therefore, Caron had every legal right under Massachusetts law to obtain a firearms identification card and, once he possessed it, to keep and carry rifles and shotguns. As a felon, however, this very conduct appeared to violate federal law and it is for this violation that he stands convicted. As Massachusetts has both substantially restored Caron's civil rights and has not expressly prohibited Caron from shipping or transporting (through another) or possessing or receiving rifles or shotguns, he may not be sentenced as an armed career criminal.

This conclusion is buttressed by the decision of some courts of appeal that there must be an explicit statement by the state legislature before the exception to the exception in 18 U.S.C. § 921(a)(20) can be applied. See, e.g., United States v. Gomez, 911 F.2d at 221-22 ("[T]he provision restricting the convicted felon's right to ... possess or receive forearms must be express."); United States v. Erwin, 902 F.2d 510, 513 (7th Cir.1990) ("A state must tell the felon point blank that weapons are not kosher") (emphasis added). In Gomez, the Ninth Circuit was persuaded by the "crucial fact" that Idaho had no state statute at all prohibiting felons from possessing firearms. Gomez, 911 F.2d at 222. Massachusetts law contains such statutes, and Gomez is thus

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distinguishable from this case, but Massachusetts does not--and this is crucial here--prohibit Caron from possessing the rifles and shotguns that formed the basis for his federal conviction.

The Court acknowledges, as it must, that Chief Judge DiClerico faced precisely the same question of the interrelation between the federal and Massachusetts gun control legislation in United States v. Estrella, Crim. No. 95-81-01-JD, slip op. (D.N.H. Apr. 3, 1996) (DiClerico, C.J.)--and reached a contrary conclusion. That is, Estrella stands for the proposition that, although Massachusetts substantially restores a felon's civil rights seven years after conviction (this point was conceded by the government in Estrella, see note 10 above), it sufficiently restricts a felon's *252 access to firearms such that the exception to the exception applies. Accordingly, Chief Judge DiClerico ruled that the state felony conviction at issue provided a proper basis for a federal conviction under 18 U.S.C. § 922(g). Id. at 7. This Court respectfully reaches a different conclusion based on the definitional distinctions as between federal and Massachusetts law and, within Massachusetts law, as between rifles and shotguns and handguns.

The result in Estrella and the decision herein can, however, be harmonized. Estrella was convicted as a felon-in-possession of a weapon that the laws of Massachusetts expressly forbid him to possess without a firearms identification card. Such a harmonization, however, carries with it attendant complexities--i.e., that Massachusetts felons with three prior qualifying convictions who have had their civil rights restored but who thereafter possess weapons without a firearms identification card may be sentenced as armed career criminals, while identically situated felons with a firearms identification card who possess rifles and shotguns (and handguns in their homes) may not. This court need not assay such a harmonization in this case, for it suffices to hold that Massachusetts has not sufficiently proscribed Caron's association with firearms such that he may be sentenced as an armed career criminal in federal court.

D. Resentencing? The Law of Unintended Consequences

The First Circuit concluded its opinion in Caron II with the order: "The judgment [upon Caron] is vacated and the matter remanded to the district court for resentencing." The clear import of this mandate is that Caron will remain subject to some lawful sentence. It is the range of the appropriate sentence that has been the focus of the parties' dispute during the hearings on remand, i.e. either the 15-22 2/3 years range (the range between the fifteen year minimum mandatory sentence required by the Armed Career Criminal Act up to the sentence required by the Sentencing Guidelines and earlier imposed by this Court) or the 37 months to 10 years range (the sentence required by the interplay of the minimum sentence permitted by the Sentencing Guidelines and the statutory maximum for the offense of being a felon-in-possession).

[8] The analysis herein, however, leads inexorably to the conclusion that, once Caron II reversed the Ramos doctrine that only individualized treatment could restore a felon's civil rights, at that very moment, were Caron's offenses against the laws of Massachusetts alone, his indictment would become a nullity ab initio and thus subject to dismissal. In these circumstances, it would appear that Caron ought now be set at liberty. This is a remarkable result, apparently not contemplated by the First Circuit and in fact not urged upon the Court by any party. Still, were Caron's record from Massachusetts alone such a result would be compelled by the undisputed facts on this record.

The confusion appears to stem from our too glib reference to the offense of conviction as the offense of being "a felon in possession of a firearm." Caron is, of course, a felon in the common law sense, i.e. he has been convicted of offenses which carry a potential sentence of more than one year in prison. Congress has not left it at that, however. In 18 U.S.C. § 921(a)(20) Congress provides expressly that "the term 'crime punishable by imprisonment for a term exceeding one year' does not include--[the exception with the exception to the exception]" that have been the focus of part II of this opinion. (emphasis added) Moreover, this definition applies not only to the determination of what constitutes a predicate offense for the purpose of sentence enhancement, see 18 U.S.C. § 924(e), it defines the offense of conviction as well. See 18 U.S.C. § 922(g). Just as Caron is no longer a felon for the purpose of enhancing his offense of conviction, so too--at least as to his Massachusetts convictions--he is not a felon for the purpose of offending against

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the felon-in-possession statute itself.

Consider the following: Caron's most recent felony conviction took place on April 30, 1979. He received a two year suspended sentence for unlawfully dealing in, possessing, and transferring firearms.

*253 Five years later, on April 30, 1984, Caron became eligible once again to have a Massachusetts firearms identification card issued to him as matter of right.

On April 30, 1986, seven years after his last felony conviction, Caron had the last of his civil rights--the right to sit on a Massachusetts jury--substantially restored. At this point, his status was--What? A felon at common law, he no longer fit the Congressional definition found in 18 U.S.C. § 921(a)(20). As to his Massachusetts record at least, Caron was then an ex-felon for the purposes of federal law.

In June, 1991, Caron applied for and received a Massachusetts firearms identification card, thus making lawful (under Massachusetts law) his possession of the rifles and shotguns seized by federal agents in 1993.

On February 10, 1994, Caron was indicted in this Court for various violations of 18 U.S.C. § 922(g)(1), all stemming from his status as a federally-defined "felon." Yet, he was not.

True, for the seven years following April 30, 1979, he was, in fact, a federally-defined "felon." But on that date, April 30, 1986, Caron became, as to his Massachusetts record, an ex-felon--and there is simply no offense of being an "ex-felon-in-possession." [FN20]

FN20. Of course, under Ramos, Caron's status as a federally-defined felon was precisely correct as he had never received any individualized Massachusetts pardon. Therefore, under the law as it stood at the time of Caron's indictment and conviction, the proceeding against him was entirely lawful. Everything changed, however, when Ramos was reversed in Caron II.

The Ninth Circuit confronted a similar issue in Dahms, 938 F.2d 131 (9th Cir.1991). Dahms pleaded guilty in Michigan state court to a felony. After his release, he was subsequently convicted in Montana of violating section 922(g)(1) for being a felon in possession of a firearm, specifically a shotgun. Id. at 132. Upon appeal, the Ninth Circuit reversed the conviction, holding that Dahms should not have been indicted under section 922(g)(1) because he was not a convicted felon according to section 921(a)(20). As part of its analysis, the Dahms court examined Michigan state law and determined that although Michigan restricted an ex-felon's right to possess pistols, his right to possess a shotgun remained intact. Id. at 135 (interpreting Mich.Comp.Laws § 28.422 [1989]). This fact, combined with Michigan's distinction between pistols and shotguns in a separate concealment statute, proved crucial in the court's determination that Michigan did not intend to restrict a felon's ability to possess all types of firearms. Id. (comparing Mich.Comp.Laws § 28.422 [licensing statute] with Mich.Comp.Laws § 750.222[a] [concealment statute]). In conclusion, the court stated: "To apply § 922(g)(1) and conclude that Dahms' right to possess any firearm was restricted under federal law because the state restricted his possession of a pistol would undermine the explicit deference to state law in § 921(a)(20)," which Congress intended. Id.

The Ninth Circuit's approach in Dahms has been criticized by the Sixth Circuit in United States v. Driscoll, 970 F.2d 1472 (6th Cir.1992), cert. denied, 506 U.S. 1083, 113 S.Ct. 1056, 122 L.Ed.2d 362 (1993). Similar to the defendant in Dahms, Driscoll was convicted of violating section 922(g)(1) for possessing a shotgun. Analyzing the same Michigan laws as in Dahms, the Driscoll court interpreted section 922(g)(1) as creating an "all or nothing" approach to the possession of firearms by ex-felons: "[u]nder federal law, a person is either treated as a convicted felon, and thus prohibited from carrying any firearms, or is treated as though he had a clean record, and thus allowed to carry all legal firearms." Id. at 1480-81. The court emphatically stated that "the idea that Congress intended to treat various weapons differently within the same state simply contradicts the plain language of federal law," and therefore "refuse[d] to allow the intricate details of state law to override a fairly straightforward federal plan." Id. at 1481.

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The problem with the Sixth Circuit's "all or nothing" approach is that in section 921(a)(20) Congress has allowed the "intricate details of state law" to interfere with its federal plan. By the plain language of section 921(a)(20) as interpreted by Cassidy and *254 other courts throughout the land, Congress ceded to the states the ability to determine whether the definition of conviction in 921(a)(20) applies to a particular felon. That cession of power to the states makes state law on the issue determinative. Although the First Circuit did not opine on the matter in Caron II, at least four other circuit courts of appeal have. See, e.g., Dahms, 938 F.2d at 135 (9th Cir.1991); United States v. Burns, 934 F.2d 1157, 1160-61 (10th Cir.1991), cert. denied, 502 U.S. 1124, 112 S.Ct. 1246, 117 L.Ed.2d 478 (1992); Cassidy, 899 F.2d at 546 (6th Cir.1990) ("we ... must look to the whole of state law ... to determine if [a felon's] firearms privileges have been expressly restricted"); McLean, 904 F.2d 216, 218 (4th Cir.1990), cert. denied, 498 U.S. 875, 111 S.Ct. 203, 112 L.Ed.2d 164 (1990) (following Cassidy). In looking to the whole of state law, then, this Court must also look to the state definition of "firearm" and determine how such weapons are treated under state law. In sum, in enacting section 921(a)(20), Congress intended "deference to state law with respect to the federal firearms privileges of persons convicted in that state." McLean, 904 F.2d at 218 (quoting Cassidy, 899 F.2d at 549). That this deference would create a hodgepodge of variable state firearms restrictions was clearly recognized by Congress, as shown by the following statement of Senator Durenberger of Minnesota during debate over the Firearm Owners Protection Act in 1986:

In the State of Minnesota, a convicted felon's civil rights are automatically restored when his sentence expires. Therefore, under the new federal law, it will no longer be a violation of the Federal Gun Control Act of 1968 for a Minnesotan convicted of a felony to possess a firearm after his sentences has expired. The same will be true in each State which automatically restores a convicted felon's civil rights. This creates a problem in my State. The ironic, unintended side effect of this 'glitch in the gun law' is to turn a law intended to crack down on crime into a law that could abet crime unless Minnesota changes its law regarding the civil rights of felons....

132 Cong.Rec. S14,974 (daily ed. October 3, 1986) cited in Cassidy, 899 F.2d at 548-49. So it is.

[9] But there is more--and on the issue of whether Caron is a federally-defined "felon" as of the date of his indictment, the United States and California felony convictions must also be considered. It is here that Caron comes acropper.

III. ANALYSIS OF FEDERAL LAW

The issue of "whether a federal felon cannot have his civil rights restored under federal law ... is a complicated question, one which involves the interpretation of federal law relating to federal rights." Beecham, ---U.S. at ---- n. * *, 114 S.Ct. at 1672 n. * *. As noted above, for the purposes of section 921(a)(20), "civil rights" include "the right to vote, the right to seek and hold public office, and the right to serve on a jury." Caron, 77 F.3d at 2.

First, notwithstanding the federal conviction, Caron is eligible to vote in federal elections. Congressional electors in each state have the qualifications requisite for electors of the most numerous branch of the state legislature. U.S. Const., art. I, § 2, cl. 1 (House of Representatives); U.S. Constitution., amdt. XVII (Senate). In other words, if one may vote for a state legislator, then one may vote for Senator or Representative. As was noted earlier, Massachusetts does not disqualify an elector for state offices because of the elector's criminal history. See supra, II.A. Further, this prong of the test satisfies the Beecham court's requirement that defendant's civil rights be restored by the appropriate jurisdiction. While the specifics of elector qualifications are set by the state, the authority for the qualifications arises from the United States Constitution. United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915); Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884).

Second, the Constitution is the sole source of eligibility for President of the United States and it does not preclude felons. U.S. Const., art. II, § 1, cl. 5; see also Gordon v. Secretary of State of N.J., 460 F.Supp. 1026 (1978) (in which the plaintiff was a lawful *255 candidate for President while incarcerated). While it is true that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members," U.S. Const., art. I, § 5, the Supreme Court has held that "the Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership

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expressly prescribed in the Constitution," with the annotated observation that the same must hold true for the Senate. Powell v. McCormack, 395 U.S. 486, 522 & n. 44, 89 S.Ct. 1944, 1964 & n. 44, 23 L.Ed.2d 491 (1969). Although Caron could not have held a public office while in jail, see Mass.Gen.Laws Ann. ch. 279, § 30 (West 1981), he is now eligible for any federal elected office. Therefore, no standing rule bars Caron's ability to run for and serve in congressional office.

As a convicted felon, however, Mr. Caron has lost for all time his right to serve on a federal jury, and the loss of this crucial civil right--the right to participate in that most vital expression of direct democracy in America today, Alexis v. Leporati, Civ. No. 93-10003, 1996 WL 463675, at *2 (D.Mass. July 30, 1996), In Re Acushnet River & New Bedford Harbor, 712 F.Supp. 994, 1006 (D.Mass.1989), service on the nation's juries--is fatal to any claim by Caron that he was not a federally-defined felon at the time of his indictment.

Pursuant to 28 U.S.C. § 1865(b), a potential federal juror is excluded from service if he
(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored. [FN21]

FN21. The Jury Plan for the United States District Court for the District of Massachusetts as amended (1989) inserts the phrase "have been lost and" after the words "civil rights" in this disqualification. This minor drafting change is of no consequence to this analysis.

"This disqualification is intended to assure the 'probity' of the jury. It is rationally based, and hence is not unconstitutional." United States v. Foxworth, 599 F.2d 1, 4 (1st Cir.1979) (Gignoux, J.) (citations omitted; emphasis added).

In the First Circuit, 18 U.S.C. § 1865(b)(5) is read as a blanket disqualification of felons for jury service, United States v. Uribe, 890 F.2d 554, 561 (1st Cir.1989) ("28 U.S.C. § 1865[b][5] ... bars certain felons from acting as jurors"); Foxworth, 599 F.2d at 4 (1979); and is so implemented. [FN22]

FN22. The Court takes judicial notice, Fed.R.Evid. 201, that in the District of Massachusetts, felons whose civil rights have not been restored, see Federal Court Juror Qualification Questionnaire, questions 5-7, are uniformly excluded from jury service, not even being summoned to appear in the venire for possible empanellment.

The Fifth Circuit approach is somewhat different. There the felony conviction does not render a person incompetent to serve as a juror, though such a juror, if seated, is subject to challenge for cause. Ford v. United States, 201 F.2d 300, 301 (5th Cir.1953). The Eastern District of Michigan follows this approach. Paul J. Komives & Peggy Blotner, Loss and Restoration of Civil Rights Affecting Disqualification for Federal Jury Service, 70 Mich.B.J. 542 (June 1991) ("Restoration of Civil Rights").

Either way, the impairment of Caron's civil right to sit on a federal jury is substantial. Cf. Metzger, 3 F.3d at 759; Driscoll, 970 F.2d at 1478-79.

Moreover, unlike the case law interpreting 18 U.S.C. § 922(a)(20), restoration of civil rights under 28 U.S.C. § 1865(b)(5) is uniformly held to require an "affirmative act recognized in law" with respect to the specific felon before such a person can qualify for federal jury service. United States v. Hefner, 842 F.2d 731, 732 (4th Cir.), cert. denied, 488 U.S. 868, 109 S.Ct. 174, 102 L.Ed.2d 144 (1988); Viverito v. Levi, 395 F.Supp. 47, 48 (N.D.Ill.1975) (satisfactory termination of probation imposed by federal court restored citizenship rights to extent effected by Illinois law, but did not restore citizenship rights controlled by federal law). See Komives & Blotner, Restoration of Civil Rights at 546.

By virtue of his federal convictions, therefore, Caron is ineligible to serve on a federal *256 jury. This, in turn, means that his federal civil rights have not adequately been restored pursuant to 18 U.S.C. § 921(a)(20). Accordingly, Caron is now and, more importantly, was at the time of the instant crime and indictment, a federally-defined felon. Thus, this already over long opinion need not continue with an analysis of the current status of Caron's civil rights in California in light of his conviction for attempted murder in that jurisdiction.

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IV. CONCLUSION

For the reasons stated above, Caron cannot be resentenced as an armed career criminal. The Clerk will schedule a hearing so that he may be resentenced on the offense of conviction.

END OF DOCUMENT

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No. 97-6270

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Supreme Court, U.S.
FILED
OCT 8 1997
OFFICE OF THE CLERK

GERALD R. CARON,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to the provisions of Rule 39, the petitioner, Gerald R. Caron, moves to file the attached Petition For Writ of Certiorari to the United States Court of Appeals for the First Circuit without prepayment of costs and to proceed in forma pauperis.

The petitioner was represented in the United States Court of Appeals for the First Circuit and in the district court by counsel appointed pursuant to the Criminal Justice Act. (18 U.S.C. §3006A).

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Attorney for Petitioner

ORIGINAL

No. 97-6270

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

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FILED
OCT 8 1997
OFFICE OF THE CLERK

GERALD R. CARON,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

AFFIDAVIT OF TIMELY FILING BY MAIL

Owen S. Walker, on oath, deposes and says:

1. I am a member of the Bar of this Court.

2. I submit this affidavit in accordance with Rule 29.2 of this Court.

3. The petition for certiorari enclosed herewith is being mailed today, October 6, 1997, by United States mail, first class, in an official envelope at the John W. McCormack Post Office and Courthouse Building, Boston to

Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

4. The mailing is within the permitted time for the petition for certiorari.

Made this 6th day of October, 1997 at 2:34 pm.

under the penalties of perjury.

Owen S. Walker

Owen S. Walker

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AUG 13 1997

No. 96-2338

UNITED STATES,
Appellee,

v.

GERALD R. CARON,
Defendant, Appellant.

Before

Torruella, Chief Judge,
Selya, Boudin, Stahl* and Lynch, Circuit Judges.

ORDER OF COURT

Entered: August 11, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Vincent F. Flanagan,
Acting Clerk.

By JANICE M. O'NEIL
Chief Deputy Clerk.

*Judge Stahl Dissenting.

cc: Messrs: Walker, Kelly and Ms. Chaitowitzl

ORIGINAL

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GERALD R. CARON,
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-v.-

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I, Owen S. Walker, hereby certify that on this 6th day of October, 1997, I served the Petition For Writ of Certiorari and Motion to Proceed in Forma Pauperis on all parties to be served.

In accordance with Rule 29.3 of the Supreme Court Rules said service has been made by sending one copy by first class mail to:

Brian T. Kelly
Assistant U.S. Attorney
1003 P.O. & Courthouse Building
Boston, MA 02109

Hon. Walter Dellinger
Solicitor General
Department of Justice
Washington, D.C. 20530

Owen S. Walker
Federal Defender Office
125 Pearl Street, 3rd Floor
Boston, MA 02110

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

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CARON, GERALD R.
Petitioner

vs.

USA

No. 97-6270

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 3rd day of December 1997.

OWEN S. WALKER
FEDERAL DEFENDER OFFICE
125 PEARL STREET, 3RD FLOOR
BOSTON, MA 02110

Seth P. Waxman/as
SETH P. WAXMAN
Solicitor General

December 3, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GERALD R. CARON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether continuing state restrictions on petitioner's possession of firearms precluded a holding that his civil rights had been restored, within the meaning of 18 U.S.C. 921(a)(20), with respect to prior felony convictions that served as the basis for imposing an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. 924(e)(1).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-6270

GERALD R. CARON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a)[1] is not reported. Earlier opinions of the court of appeals in this case are reported at 77 F.3d 1 (en banc) and 64 F.3d 713. The opinion of the district court (Pet. App. 3a-20a) is reported at 941 F. Supp. 238.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1997. On August 7, 1997, Justice Souter extended the time within which to file a petition for a writ of certiorari to October 6,

---

[1] The pages in the appendix to the petition are not numbered. We have numbered them sequentially from 1a-21a, and we refer to those numbers in this brief.

1997. A petition for rehearing was denied on August 11, 1997. Pet. App. 21a.[2] The petition for a writ of certiorari was filed on October 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on four counts of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). He was sentenced to 262 months' imprisonment under the enhanced sentencing provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). A panel of the court of appeals affirmed, United States v. Caron (Caron I), 64 F.3d 713 (1st Cir. 1995), but the court reheard the case en banc, vacated the enhanced sentence, and remanded for resentencing. United States v. Caron (Caron II), 77 F.3d 1 (1st Cir.), cert. denied, 116 S. Ct. 2569 (1996). On remand, the district court concluded that the ACCA did not apply, but it departed upward from the range otherwise applicable under the Sentencing Guidelines and imposed a 120-month sentence. Pet. App. 2a, 3a-20a. The court of appeals reversed the holding that the ACCA did not apply, and again remanded for resentencing. Pet. App. 1a-2a.

---

[2] We note that the petition was filed after the last day to which time was extended by Justice Souter's order, and that there is some question whether petitioner sought rehearing, as well as rehearing en banc, from the court of appeals. See Pet. 1. Under this Court's Rule 13.3, a suggestion of en banc rehearing is not treated as a petition for rehearing "unless so treated by the * * * court of appeals." Sup. Ct. R. 13.3; see also First Circuit Rules 35.1-35.3; compare Seventh Circuit Rule 35(c).

1. Federal law prohibits any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" from possessing "any firearm" in or affecting commerce. 18 U.S.C. 922(g)(1). The term "firearm" is defined broadly to include "any weapon * * * which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. 921(a)(3). The Armed Career Criminal Act, 18 U.S.C. 924(e)(1), requires a mandatory minimum sentence of 15 years' imprisonment for any person convicted under Section 922(g)(1) who has "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." For purposes of both Section 922(g)(1) and Section 924(e)(1), Section 921(a)(20) provides that

> What constitutes a conviction * * * shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had his civil rights restored shall not be considered a conviction * * *, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. In July 1993, law enforcement agents found petitioner intoxicated, talking with a woman, and holding a rifle, with his finger on the trigger. The agents arrested petitioner and seized the rifle and 185 rounds of ammunition. Another federal agent subsequently advised petitioner that federal law barred him from possessing firearms because he had been convicted of a felony. In December 1993, agents executed a federal search warrant and seized from petitioner six firearms and 6,823 rounds of ammunition. Pet. App. 4a n.1; Caron I, 64 F.3d at 714.

A federal jury found petitioner guilty of four counts of possessing a firearm in violation of Section 922(g)(1). The district court then found that petitioner was subject to the enhanced sentencing provisions of Section 924(e)(1). Petitioner's predicate offenses included three Massachusetts felony convictions for breaking and entering, a California conviction for assault with intent to murder and attempted murder, and a previous federal firearms conviction. Each of the four state convictions qualified as a "violent felony" for purposes of Section 924(e)(1). Pet. 3; Caron II, 77 F.3d at 2.

Petitioner argued that his Massachusetts convictions should not be counted for enhancement purposes because his civil rights had been restored, with respect to those convictions, within the meaning of Section 921(a)(20). The district court rejected that argument and sentenced petitioner as an armed career offender. The court of appeals initially affirmed both petitioner's convictions and his sentence. Caron I, supra. After granting en banc rehearing to consider a limited sentencing issue, however, the court vacated petitioner's sentence and remanded for resentencing. Caron II, supra. Reversing previous circuit precedent, the full court held that a defendant's civil rights may be restored, for purposes of Section 921(a)(20), by laws of general application. Id. at 2. The court then remanded the case to the district court for a determination whether petitioner's right to sit on a jury had been "restored" under Massachusetts law, and whether, if so, the

State had nonetheless "expressly provide[d]" that petitioner was not to carry firearms. Id. at 6.

On remand, the district court held that petitioner's right to serve on juries had indeed been restored (Pet. App. 6a-10a), and that the "unless" clause of Section 921(a)(20) did not apply to petitioner because Massachusetts law permitted petitioner, if he obtained an appropriate identification card (which he had done), to possess firearms at his home or place of business and to carry rifles or shotguns (but not handguns) on his person or in his car. Pet. App. 15a-16a. The court therefore concluded that petitioner could not be sentenced under the Armed Career Criminal Act. Id. at 16a. In resentencing, however, the court chose to depart upwards from the Sentencing Guidelines range applicable to non-career offenders, and it sentenced petitioner to ten years' imprisonment. See Pet. App. 2a.

3. The court of appeals reversed. Pet. App. 1a-2a. Relying on its intervening decision in United States v. Estrella, 104 F.3d 3, cert. denied, 117 S. Ct. 2494 (1997), the Court held that Massachusetts' ban on possession of handguns by former felons outside their homes or businesses was a sufficiently substantial restriction on the possession of firearms to preserve the federal ban in its entirety. Pet. App. 2a. Rejecting petitioner's argument that his possession of a state firearms identification card distinguished him from the "ordinary Massachusetts felon" whose situation

it had considered in Estrella, the court once again vacated petitioner's sentence and remanded the case for resentencing. Ibid.

ARGUMENT

1. Petitioner argues (Pet. 6-16) that the restrictions Massachusetts imposes on gun possession by a former felon should not be construed as "expressly provid[ing] that the [felon] may not * * * possess * * * firearms" within the meaning of 18 U.S.C. 921(a)(20).[3] This Court has recently denied review in two cases presenting the same issue, including the case on which the court below relied (Pet. App. 2a) in rejecting petitioner's claim, and there is no reason for a different result here. See Alston v. United States, No. 97-5794 (Dec. 1, 1997); Estrella v. United States, 117 S. Ct. 2494 (1997) (No. 96-9112).

The court of appeals correctly held that "a conviction counts within the meaning of § 92[1](a)(20) if the state continues in any way to restrict significantly the ex-felon's right to ship, transport, possess, or receive firearms." Pet. App. 2a. The court relied on its previous decision in United States v. Estrella, 104 F.3d 3, cert. denied, 117 S. Ct. 2494 (1997), in which it noted that, in making such a determination under Section 921(a)(20), a court must look to the convicting State's law as a whole. Id. at

[3] In its most recent decision (Pet. App. 16a-19a), the district court pointed out that petitioner has at least one federal felony conviction for which his civil rights have not been restored within the meaning of Section 921(a)(20). The court therefore concluded (Pet. App. 18a-19a) that the status of petitioner's Massachusett's convictions did not affect the validity of (as opposed to the appropriate sentence for) his present conviction under Section 922(g)(1).

7; accord, e.g., United States v. Hall, 20 F.3d 1066, 1069 (10th Cir. 1994); United States v. Burns, 934 F.2d 1157, 1159 (10th Cir. 1991), cert. denied, 502 U.S. 1124 (1992); United States v. Cassidy, 899 F.2d 543, 549 (6th Cir. 1990).

The opinion in Estrella explained (104 F.3d at 7) that, in Massachusetts, a felon who has been out of custody for more than five years may obtain a permit to possess a handgun in his residence or place of business (and to possess a rifle or long-barrel shotgun in any place). No felon, however, may carry a handgun in other places; purchase, rent, or lease a handgun; or sell, rent, or lease any firearm to another person. Ibid. On the basis of this "patchwork of restrictions" (id. at 8), the Estrella court concluded that "Massachusetts' ban on handgun possession by ex-felons outside the home or business is a substantial enough limit on firearms rights to preserve the federal ban" under the "unless" clause of Section 921(a)(20). In this case, the same court simply applied the decision in Estrella to the facts of petitioner's case. Pet. App. 2a.

The First Circuit's decisions in Estrella and in this case (as well as in United States v. Alston, 112 F.3d 32, cert. denied, No. 97-5794 (Dec. 1, 1997)) are consistent with those of at least two other courts of appeals that have considered similar partial-restriction situations under the laws of other States. See United States v. Lee, 72 F.3d 55, 57-58 (7th Cir. 1995); United States v. Driscoll, 970 F.2d 1472, 1480-1481 (6th Cir. 1992), cert. denied, 506 U.S. 1083 (1993); see also United States v. Palazzi, 115 F.3d

906, 908 (11th Cir. 1997) (following Estrella; unclear whether handgun was possessed outside defendant's home or business); United States v. Ellis, 949 F.2d 952, 954-955 (8th Cir. 1991) (state law prohibiting possession of a pistol "restricts the civil right of firearms possession" for purposes of federal law); Burns, 934 F.2d at 1160-1161 (relying on state law prohibiting only possession of short-barrelled guns).[4] The Fourth and Ninth Circuits have held, to the contrary, that the "unless" clause of Section 921(a)(20) should be construed to continue the federal firearms prohibition, with respect to a felon whose civil rights have otherwise been restored, only under circumstances in which the continuing firearms prohibitions imposed by the State of conviction itself would apply to the felon and the firearm in question. See United States v. Tomlinson, 67 F.3d 509, 513 & n.8 (4th Cir. 1995); United States v. Dahms, 938 F.2d 131, 134-135 (9th Cir. 1991); see also United States v. Wind, 986 F.2d 1248, 1251-1252 (8th Cir. 1993) (discussed in note 4, supra).[5]

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[4] The courts have adopted somewhat different rationales to support the same result. See Estrella, 104 F.3d at 8 & n.2 (citing cases). In addition, as petitioner correctly notes (Pet. 16), the Eighth Circuit's decision in United States v. Wind, 986 F.2d 1248 (8th Cir. 1993) (concurring opinion of two judges) suggests the contrary result, and is therefore in tension with that court's decision in Ellis. Such tension is ordinarily a matter to be resolved by the court of appeals whose decisions are involved. Wisniewski v. United States, 353 U.S. 901 (1957).

[5] The Ninth Circuit has concluded that Massachusetts never substantially restores the civil rights of its felons for purposes of Section 921(a)(20). United States v. Oman, 91 F.3d 1320, 1322 (1996). Thus, the Ninth Circuit would hold that petitioner's Massachusetts violent felony convictions were valid predicates for the enhancement of his sentence under Section 924(e), whether or not state law prohibited him from carrying the firearm at issue in

Even on the assumption that the conflict in the circuits on this narrow issue would warrant review by this Court, it would be premature to address the matter in this case. The Ninth Circuit recently reheard a case en banc in order to reconsider its position on the question. United States v. Qualls, 122 F.3d 38 (1997) (reargued Nov. 20, 1997). Because that court may reverse its previous holding in Dahms in light of the contrary decisions of other Circuits, it would be more appropriate to await further consideration of the matter by the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1997

Supreme Court, U.S.
FILED
FEB 12 1998
OFFICE OF THE CLERK

No. 97-6270

In The

Supreme Court of the United States

October Term, 1997

GERALD R. CARON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

Page

Docket Entries, *United States v. Caron*, D. Mass. No. 94-10040-WGY 1

Indictment 4

United States v. Caron, 941 F.Supp. 238 (D. Mass. 1996) 9

United States v. Caron, Nos. 96-2338 and 96-2339 (1st Cir., May 9, 1997) (order remanding for resentencing and dismissing appeal of Gerald R. Caron) 52

United States v. Caron, Nos. 96-2338 and 96-2339 (1st Cir., August 11, 1997) (order denying rehearing and suggestion for rehearing en banc) 55

United States v. Estrella, 104 F.3d 3 (1st Cir., Jan. 9, 1997), *cert. denied*, 117 S.Ct. 2494 (1997) 57

Order of the Supreme Court of the United States Granting Leave to Proceed in Forma Pauperis 71

Relevant Docket Entries[1]

GERALD R. CARON v. UNITED STATES
NO. 97-6270

Date	Proceedings
	United States District Court for the District of Massachusetts Case No. 94-CR-10040-WGY
2/10/94	Indictment returned.
2/11/94	Arrest and initial appearance of Gerald R. Caron; appointment of counsel.
2/17/94	Arraignment.
3/16/94	Pretrial release of defendant under conditions.
6/30/94	Dismissal of Count One filed and allowed.
7/6/94	Jury sworn. Evidence commences.
7/6/94	Court rules that defense of entrapment by estoppel does not apply.
7/7/94	Jury returns a verdict of guilty on Counts 2-5. Court orders defendant's bail revoked and defendant remanded into custody.
9/19/94	Sentencing hearing held; sentence imposed; defendant's notice of appeal.
9/20/94	Judgment entered. Special assessment of $200. Imprisonment for a term of 262 months. Upon release, supervised release for a term of 5 years with special conditions.

---

[1] Entries edited for clarity and completeness.

United States Court of Appeals for the First Circuit
Case No. 94-2026

5/1/95 Oral argument.

7/31/95 Opinion entered affirming judgment of the district court.

9/21/95 Appellant's petition for en banc rehearing granted limited to the following issues: "May a felony conviction, either in the absence of state deprivation of the rights of the convicted felon or after restoration of the rights of the convicted felon or after restoration of some or all of those rights by operation of state law, without any individualized determination, be counted for purposes of the Armed Career Criminal Act, 18 USC 921(a)(20) (which provides in substance that felonies for which the felon's civil rights have been restored are not to be considered in determining eligibility for sentence enhancement), or similarly worded statutes?"

2/26/96 Judgment of district court vacated and matter remanded for resentencing. Appellant's petition for rehearing denied.

United States Supreme Court
No. 95-9120

5/17/96 Gerald R. Caron's petition for certiorari filed.

6/24/96 Petition for certiorari denied.

United States District Court for the District of Massachusetts
Case No. 94-CR-10040-WGY (cont'd)

5/8/96 Resentencing hearing; court takes the matter under advisement.

7/31/96 Status conference as to Gerald R. Caron held.

9/12/96 Memorandum and Order ruling that defendant cannot be resentenced as an armed career criminal.

10/15/96 Sentencing hearing.
Court announces the guideline calculations as follows: 37-46 months imprisonment – $7500-$75,000 fine – 2-3 years supervised release. Government motion for upward departure allowed. Court vacates the previous sentence and imposes sentence of imprisonment for 120 months, special assessment of $200, a three year term of supervised release with conditions.

10/16/96 Defendant's notice of appeal.

10/22/96 Judgment entered.

11/7/96 Government's notice of appeal.

United States Court of Appeals for the First Circuit
Case No. 96-2338 (appeal by Gerald R. Caron)
Case No. 96-2339 (appeal by United States)

5/9/97 Order entered vacating district court's judgment and remanding for resentencing and dismissing Gerald R. Caron's appeal.

6/6/97 Gerald R. Caron's petition for en banc hearing filed.

8/11/97 Gerald R. Caron's petition for en banc hearing (treated also as a petition for rehearing) denied.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	Criminal No. 94-10040WGY
v.	)	
GERALD R. CARON	)	VIOLATIONS – 18 U.S.C. § 371 – Conspiracy – 18 U.S.C. § 922 (g)(1) – Felon In Possession of A Firearm – 18 U.S.C. § 922 (g)(1) – Felon In Possession of Ammunition

INDICTMENT

THE UNITED STATES GRAND JURY for the District of Massachusetts charges that:

COUNT ONE

From on or about April 3, 1991 to on or about December 1, 1993, in the District of Massachusetts, defendant GERALD R. CARON, and other persons known and unknown to the grand jury, knowingly, willfully, and unlawfully combined, conspired, and agreed with each other to commit an offense against the United States; that is, that GERALD R. CARON, having been a person previously convicted of a crime punishable by imprisonment for a term exceeding one year, would possess a firearm, in and affecting commerce, in violation of Title 18, United States Code, § 922(g).

In furtherance of the conspiracy, and to effect the objects thereof, defendant GERALD R. CARON committed the following overt acts, among others, in the District of Massachusetts:

a. On or about July 23, 1991, CARON acquired a firearm, to wit: a Ruger, model 10/22. .22LR caliber semi-automatic rifle, bearing serial number 23333659, after it was purchased at Bob's Sport Shop in Westport, MA.

b. On or about July 14, 1993, CARON possessed the Ruger, model 10/22, .22LR caliber semi-automatic rifle, bearing serial number 23333659, in Fall River, MA.

c. On or about March 4, 1992, CARON acquired a firearm, to wit: a Remington, Model 7400, 30.06 caliber semi-automatic rifle, bearing serial number 8228275, after it was purchased at Jim's Archery & Gun store in Assonet, MA.

d. On or about December 1, 1993, CARON possessed the Remington, Model 7400, 30.06 caliber semi-automatic rifle, bearing serial number 8228275, at his residence in Westport, MA.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

~~On or~~ about July 14, 1993, at Fall River, in the District of Massachusetts,

GERALD R. CARON,

defendant herein, did knowingly possess a firearm, to wit: a Ruger, model 10/22, .22LR caliber semi-automatic rifle, bearing serial number 23333659, in and affecting commerce, after having been convicted in a court of a crime punishable by imprisonment for a term in excess of one year.

All in violation of Title 18, United States Code, Section 922(g)(1).

COUNT THREE

On or about July 14, 1993, at Fall River, in the District of Massachusetts,

GERALD R. CARON,

defendant herein, did knowingly possess ammunition, to wit: approximately 185 rounds of .22 caliber ammunition, in and affecting commerce, after having been convicted in a court of a crime punishable by imprisonment for a term in excess of one year.

All in violation of Title 18, United States Code, Section 922(g)(1).

COUNT FOUR

On or about December, 1, 1993, at Westport, in the District of Massachusetts,

GERALD R. CARON,

defendant herein, did knowingly possess a firearm, to wit:

a Remington, model .870 express magnum, 12 gauge shotgun, bearing serial number W827217M;

a Winchester, model 120, 12 gauge shotgun, bearing serial number L2042849;

a Ruger, model 10/22 carbine, .22LR caliber rifle, bearing serial number 233-73737;

a Marlin, model 336CS, .35 Remington caliber rifle, bearing serial number 11003317;

a Remington, model 700, 30-06 caliber rifle, bearing serial number B6746516;

a Remington, model 7400, semi-automatic rifle, 30-06 caliber, bearing serial number 8228275;

in and affecting commerce, after having been convicted in a court of a crime punishable by imprisonment for a term in excess of one year.

All in violation of Title 18, United States Code, Section 922(g)(1).

COUNT FIVE

On or about December 1, 1993, at Westport, in the District of Massachusetts,

GERALD R. CARON,

defendant herein, did knowingly possess ammunition, to wit: approximately 6,823 rounds of various gauges and caliber ammunition, in and affecting commerce, after having been convicted in a court of a crime punishable by imprisonment for a term in excess of one year.

All in violation of Title 18, United States Code, Section 922(g)(1).

A TRUE BILL

/s/ Illegible
Foreperson of the Grand Jury

/s/ Illegible
Assistant United States Attorney

DISTRICT OF MASSACHUSETTS; illegible, 1994. Returned into the District Court by the Grand Jurors and filed.

/s/ Illegible
Deputy Clerk

Feb. 10, 1994
at 3:00 p.m.

United States District Court,
D. Massachusetts.

UNITED STATES of America

v.

Gerald R. CARON.

Criminal No. 94-10040-WGY.

Sept. 12, 1996.

MEMORANDUM AND ORDER

YOUNG, District Judge.

I. PROCEDURAL BACKGROUND

On February 10, 1994, Gerald R. Caron ("Caron") was indicted in this Court for various violations of 18 U.S.C. § 922(g)(1), all stemming from his status as a federally-defined "felon" in possession of firearms. At his trial[1] the jury found Caron guilty of four counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[2] After conviction, this Court sentenced Caron

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[1] The facts as revealed in trial are that on July 14, 1993, Caron was apprehended by the police. He was intoxicated and holding a rifle with his finger on the trigger while talking with a woman. At that time, police seized a .22 caliber rifle and 185 rounds of ammunition. On December 1, 1993, police and agents from the department of Alcohol, Tobacco, and Firearms raided Caron's house and seized six rifles and shotguns and 6,823 rounds of ammunition.

[2] Title 18 U.S.C. § 922(g)(1) states that it is unlawful for any person:

> who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one

to 262 months in a federal penitentiary pursuant to the Firearms Owners' Protection Act, Pub.L. No. 99-308, § 104(a)(4), 100 stat. 449, 456 (1986) (codified as amended at 18 U.S.C. § 924[e]), one of the myriad variations of the popular "three strikes and you're out" policy.[3] In *United States v. Caron*, 64 F.3d 713, 715 (1st Cir.1995) (*Caron I*), the United States Court of Appeals for the First Circuit

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> year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . . which had been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1).

[3] Section 924(e) states, in relevant part:

> In the case of a person who violates section 922(g) . . . and has three previous convictions . . . for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1). Sentencing enhancements under this provision are commonly referred to as being the sentencing of an armed career criminal.

As a younger man, Caron had offended against the laws of four separate sovereigns: a New Hampshire misdemeanor conviction for possessing burglarious instruments, three Massachusetts felonies involving breaking and entering, a California conviction of attempted murder, and three federal firearms convictions within this District arising out of the same incident. Pre-Sentence Report ¶¶ 57-89 (Aug. 31, 1994). His last conviction prior to the present case took place in 1979. *United States v. Caron*, 615 F.2d 920 (1st Cir.1980) (affirming earlier conviction and holding defendant's appeal frivolous).

affirmed this conviction, but granted a limited rehearing *en banc*, *Caron I*, 64 F.3d at 719, to consider whether certain of Caron's prior felony convictions properly could be counted as predicate crimes for the purpose of sentencing him as an Armed Career Criminal in view of the third sentence of 18 U.S.C. § 921(a)(20)[4] which provides specifically that:

> [a]ny conviction which has been expunged, or set aside or for which a person has been pardoned *or has had civil rights restored* shall not be considered a conviction . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (emphasis added).

In *United States v. Caron*, 77 F.3d 1 (1st Cir.) (*Caron II*) *cert. denied*, ___ U.S. ___, 116 S.Ct. 2569, 135 L.Ed.2d 1085 (1996), the First Circuit sitting *en banc* reversed its earlier decision in *United States v. Ramos*, 961 F.2d 1003 (1st Cir.1992), and held that civil rights may be restored within the meaning of section 921(a)(20) by laws of general or automatic application rather than by "focused, individualized, affirmative action." *Caron II*, 77 F.3d at 2 (citing *Ramos*, 961 F.2d at 1009).[5] The First Circuit also held that "the fact that one civil right was never lost did not prevent an individual from 'having had civil rights

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[4] Section 921(a)(20) was enacted in the Firearm Owners' Protection Act, Pub.L. No. 99-308, § 101(5), 100 Stat. 449, 449-50 (1985).

[5] This holding brought the law of this circuit into sync with that of seven other circuits, *see Caron II*, 77 F.3d at 2 & n. 1 and cases cited therein.

restored' " within the meaning of section 921(a)(20), *id.*, and remanded the case to this Court for resentencing in accordance with its opinion.

Caron II does not purport to answer all the questions that necessarily arise upon the resentencing. Specifically, the First Circuit instructed this Court to determine (1) whether Caron's right to sit on a Massachusetts jury had not been sufficiently restored, or (2) whether Massachusetts law contains an express provision against ex-felons possessing firearms, *id.* at 6,[6] such that Caron ought still be sentenced as an armed career criminal, i.e. pursuant to 18 U.S.C. § 924(e)(1). The parties have briefed these issues and the Court has heard argument thereon. The government continues staunchly to maintain that Massachusetts statutes do not completely restore a felon's civil right to serve on a jury and, in any event, expressly restrict their right to possess firearms.[7] Government's Resentencing Memorandum at 2.

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[6] The First Circuit's focus on Massachusetts law makes sense, even though Caron has been convicted of felonies in the courts of California and the United States as well. This is so because the California felony convictions resulted from one incident and the United States convictions from another. That's two. Section 924(e)(1) requires convictions stemming from violent felonies on three separate occasions. Should the Massachusetts' convictions not count, therefore, resentencing at a lower range is mandatory. As will be seen, however, analysis of Massachusetts law alone is insufficient to establish the framework for resentencing.

[7] This Court notes at the outset that there is no individual right to possess firearms, nor is possession of a firearm a civil right. *See United States v. Warin*, 530 F.2d 103, 106-07 (6th Cir.), *cert. denied*, 426 U.S. 948, 96 S.Ct. 3168, 49 L.Ed.2d 1185 (1976);

II. ANALYSIS OF MASSACHUSETTS LAW

A. *Restoration of Caron's Right to Sit on a Jury in Massachusetts*

Although the First Circuit's holding in *Caron II* is dispositive of the general issue of how state and federal law may affect the restoration of Caron's civil rights with respect to his Massachusetts convictions, the specific issue of whether his right to serve on a jury has been fully restored is one of Massachusetts law, as section 921(a)(20) expressly provides, "[w]hat constitutes a conviction . . . shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." *Beecham v. United States*, 511 U.S. 368, ___, 114 S.Ct. 1669, 1670, 128 L.Ed.2d 383 (1994) (referring to this clause as "the choice-of-law clause"); *see Caron II*, 77 F.3d at 6; *United States v. Cassidy*, 899 F.2d 543, 545-46 (6th Cir.1990) (construing 18 U.S.C. § 921[a][20] and holding that Congress clearly "intended that courts refer to state law to determine whether an individual should be subject to federal firearms disabilities by virtue of a criminal conviction"). As noted by the First Circuit in *Caron II*, civil rights, as referred to within the meaning of section 921(a)(20), comprise the right to vote, the right to seek

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Thomas v. The Members of the City Council of Portland, 730 F.2d 41, 42 (1st Cir.1984) (holding that established case law clearly grants no federal constitutional right to carry a concealed weapon); *United States v. Kozerski*, 518 F.Supp. 1082, 1090 (D.N.H.1981) (holding that the right guaranteed by the Second Amendment is a collective right to bear arms rather than an individual right).

and hold public office, and the right to serve on a jury. *See Caron II*, 77 F.3d at 2 (citing *Cassidy*, 899 F.2d at 549).

In the Commonwealth, a convicted felon's right to vote is guaranteed by law and can never be taken away. *See* Mass.Gen.Laws Ann. ch. 54, §§ 86, 103B (West 1991); *see also Cepulonis v. Secretary of the Commonwealth*, 389 Mass. 930, 937-38, 452 N.E.2d 1137 (1983). Convicted felons do, however, lose their right to hold public office, but only during the period of their incarceration. *See* Mass.Gen.Laws Ann. ch. 279, § 30 (West 1981). Neither of these first two civil rights is at issue, since they do not apply to Caron: he never lost his right to vote, and he regained his right to seek and hold public office following his release from prison.[8]

The status of the third right, the right to serve on a jury, is less clear. In Massachusetts, a felon is disqualified from service as a juror until seven years have passed since the conviction. Mass.Gen.Laws Ann. ch. 234A § 4(7)

---

[8] To be sure, there are other restrictions placed on convicted felons in Massachusetts. For example, a felon cannot be a police officer, Mass.Gen.Laws Ann. ch. 41, § 96A (West 1994); be appointed as an inspector of public safety, Mass.Gen.Laws Ann. ch. 22, § 6A (West 1994); or become a corrections officer or be involved with any position involving the regulation of a correctional facility, Mass.Gen.Laws Ann. ch. 125, § 9 (West 1991). Massachusetts also bars convicted felons from applying for a liquor license, Mass.Gen.Laws Ann. ch. 138 § 15 (West 1991); selling ammunition, Mass.Gen.L. ch. 140, § 122B (West 1991); and operating a driving school, Mass.Gen.Laws Ann. ch. 90, § 32G (West 1989). These restrictions, although onerous, do not amount to a loss of civil rights as defined by *Caron II*, and so are not considered here.

(West 1986) (grounds for disqualification from juror service). On its face, chapter 234A appears to be a "law of general or automatic application" as referred to by the First Circuit in *Caron II*, 77 F.3d at 2, since it allows for the passive restoration of the right to serve on a jury after the seven year time period has elapsed. Thus, this civil right is restored without any "affirmative, individualized" state action. *Caron II*, of course, reversed *Ramos*, 961 F.2d at 1009 (holding that "individualized official judgment" is necessary as evidence of the state's "renewed trust" in the individual in order to restore a felon's civil rights under 18 U.S.C. § 921 [a][20]).

The Court takes judicial notice of the judicial procedures of the Commonwealth to implement Mass.Gen.L. ch. 234A, § 4(7). Fed.R.Evid. 201. The juror questionnaire propounded by the Commonwealth's Jury Commissioner asks whether one has been convicted of a felony.[9] Where there is an affirmative response, the Office of the Jury Commissioner checks the date of conviction and, for seven years thereafter, deletes the individual from the roster of individuals summoned for service to the various courthouses of the Commonwealth. Thereafter, however, the individual's response to the questionnaire is forwarded for service along with those of all other eligible jurors.

Under Mass.Gen.L. ch. 234, § 8, however, a justice may relieve a person who has been convicted of any

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[9] *See* question 3, reason code 07 to Massachusetts' Confidential Juror Questionnaire, *reprinted in full* in 1 William G. Young, Juries, Judges and Judging 123-24 (MCLE 1996).

felony from a jury panel solely on the basis of the prior felony conviction.

> If a person whose name has been so placed in the jury box has been convicted on any felony, . . . or is found by the justice holding court to be unqualified or unfit to serve as a juror, he *may* be relieved by said justice from sitting in any case, or his name ordered by the justice to be stricken from the jury list.

Mass.Gen.Laws Ann. ch. 234, § 8 (West 1986) (emphasis added). Under Massachusetts law, therefore, justices of the Commonwealth may, but are not required to, exclude individuals with criminal records from the venire based on their criminal records. *See, e.g., Commonwealth v. Amazeen*, 375 Mass. 73, 82-83, 375 N.E.2d 693 (1978) (holding that the trial court did not err in excusing a juror previously sentenced to six months in jail); *Commonwealth v. Martin*, 357 Mass. 190, 191, 257 N.E.2d 444 (1970) (holding that trial justice's dismissal of six veniremen without examination on the basis of their prior criminal records did not deprive defendant of a fair jury); *but see Commonwealth v. Wong Chung*, 186 Mass. 231, 234, 71 N.E. 292 (1904) (holding that a record of conviction of a crime does not necessarily disqualify one from serving as a juror and noting "it is not the law that persons convicted of a crime shall be permanently deprived of their civil rights").

The convergence of these two statutes establishes the following peculiar situation: a convicted felon as to whom the requisite amount of time since conviction has passed and who is otherwise qualified to serve as a juror may nonetheless be stripped of his civil right to sit on a

jury – a right which had been restored to him automatically by act of law – by the justice holding court, acting pursuant to powers granted by statute. Because of the power granted to trial justices pursuant to section 8 of chapter 234, what exists in this Commonwealth is not the full restoration of a felon's civil right to sit on a jury but – to borrow a term from the law of real property – merely a civil right to sit on a jury subject to defeasance.

Addressing Caron's impaired right to serve on a jury, the government – predictably – contends that since felons like Caron can never fully regain their right to sit on a jury in Massachusetts, they can not have complete restoration of their civil rights within the meaning of 18 U.S.C. § 921(a)(20).[10] The government asserts that "an impaired right to serve on a jury indicates that a felon's rights have *not* been restored." Government's Resentencing Memorandum at 9. As support for this latter assertion, the government relies upon "numerous" decisions throughout the country. *See United States v. Essig*, 10 F.3d 968, 975-76 (3rd Cir.1993), *reh'g denied*, January 5, 1994; *United States v. Metzger*, 3 F.3d 756, 759 (4th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1374, 128 L.Ed.2d 50 (1994); *United*

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[10] This Court notes with interest a recent decision from the District of New Hampshire, *United States v. Estrella*, Crim. No. 95-81-01-JD (D.N.H. Apr. 3, 1996) (DiClerico, C.J.), which was decided shortly after the First Circuit's *Caron II* decision reversing *Ramos*. Oddly enough, in *Estrella* – a case factually very similar to the case at bar – the government conceded the very point that they now contest, namely that, *as matter of Massachusetts statutory law*, the defendant's right to sit on a jury substantially had been restored as of the date of the federal offense. *Estrella*, Crim. No. 95-81-01-JD at 5 (D.N.H. Apr. 4, 1996).

States v. Driscoll, 970 F.2d 1472, 1478-79 (6th Cir.1992), *cert. denied*, 506 U.S. 1083, 113 S.Ct. 1056, 122 L.Ed.2d 362 (1993); *Presley v. United States*, 851 F.2d 1052, 1053 (8th Cir.1988); *Berger v. United States*, 867 F.Supp. 424, 427 (S.D.W.Va.1994).

The government's reliance is misplaced. In *Essig*, the Third Circuit held that restoration of a felon's civil rights was not complete where Pennsylvania law disqualified a citizen from serving on a jury if he "has been convicted of a crime punishable by imprisonment for more than one year and has not been granted a pardon or amnesty therefor." *Essig*, 10 F.3d at 975 (quoting 42 Pa.Cons.St.Ann. § 4502[3] [1981]). Although the felon in *Essig* never lost the right to vote and retained the right to hold public office, the Third Circuit held that the retention of two of the three core civil rights did not amount to full restoration of civil rights within the meaning of section 921(a)(20). Unlike Mass.Gen.L. ch. 234A § 4(7), however, the Pennsylvania juror-disqualification statute provided no vehicle short of a full pardon or amnesty through which a convicted felon could regain the right to serve on a jury. Massachusetts provides such a vehicle after seven years have passed, regardless of whether or not a pardon has issued. *See* Mass.Gen.Laws Ann. ch. 234A, § 4(7) (West 1986).

Similar to the Third Circuit's holding in *Essig, supra*, the courts in *Presley*, 851 F.2d at 1053 and *Berger*, 867 F.Supp. at 430, concluded that a felon's civil rights were not substantially restored because state law permanently disqualified ex-felons from service as a juror. Missouri's juror-disqualification law, at issue in *Presley*, stated that "a person who is convicted . . . of any felony shall be *forever* disqualified from serving as a juror." Mo.Rev.Stat.

§ 561.026(3) (emphasis added), *cited in Presley*, 851 F.2d at 1053. The *Presley* court held that this law, coupled with other limitations on holding public office and on obtaining public employment, precluded substantial restoration of a felon's civil rights as defined in 18 U.S.C. § 921(a)(20). *Presley*, 851 F.2d at 1053. In *Berger*, the court analyzed West Virginia's juror-disqualification law and concluded that since the law was not limited to the period of time that the person was incarcerated, a felon's right to serve on a jury "was permanently lost as a result of his [felony conviction]." *Berger*, 867 F.Supp. at 430 (interpreting W.Va.Code § 52-1-8). Thus, the juror-disqualification statutes of both Missouri and West Virginia, as well as that of Pennsylvania, differ from Mass.Gen.L. ch. 234A, § 4(7) in that a person convicted of a felony in any of those states does not regain the civil right to serve on a jury unless pardoned or granted amnesty. This fact, which differs from the law and the practice of Massachusetts, proved to be the basis for the courts' conclusion that a released felon's civil rights could never substantially be preserved or restored as contemplated by Congress in enacting section 921(a)(20).

The two cases analyzing Michigan law, *Metzger* and *Driscoll*, are most similar to the case at bar and concluded that a felon's civil rights were not restored upon release from prison where the right to serve on a jury was impaired. *Metzger*, 3 F.3d at 759; *Driscoll*, 970 F.2d at 1478-79. In both *Metzger* and *Driscoll*, the defendants contended that their civil rights, which had been revoked upon conviction for a Michigan felony, had been restored under Michigan law upon their release. *Metzger*, 3 F.3d at

757; *Driscoll*, 970 F.2d at 1474. Michigan's juror-disqualification statute disqualifies from jury service anyone "under sentence for a felony at the time of jury selection." Mich.Comp.Laws Ann. § 600.1307a(1)(e) (West 1981). Although other courts had interpreted section 600.1307a(1)(e) as automatically restoring a felon's right to serve as a juror upon completion of his sentence, *see United States v. Dahms*, 938 F.2d 131, 134 (9th Cir.1991); *United States v. Gilliam*, 778 F.Supp. 935, 937 (E.D.Mich.1991), *rev'd*, 979 F.2d 436 (6th Cir.1992), *cert. denied*, 507 U.S. 1034, 113 S.Ct. 1856, 123 L.Ed.2d 478 (1993), the *Metzger* and *Driscoll* courts rejected those interpretations, holding that the Michigan Court Rules made a felony conviction grounds for an automatic for-cause challenge to a prospective juror and thus impaired the juror's right to serve on a jury. *See Metzger*, 3 F.3d at 759 (relying upon Mich.Ct.R. 2.511[D][2] [1991]); *Driscoll*, 970 F.2d at 1478-79 (same). Like the *Driscoll* majority, the *Metzger* court also found instructive the fact that the Michigan Court Rules "directed – although they did not require – Michigan courts to excuse convicted felons *sua sponte* from jury panels in criminal cases once that ground for exclusion was established." *Metzger*, 3 F.3d at 759 (citing Mich.Ct.R. 6.412[D][2]).[11]

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[11] Specifically, Mich.Ct.R. 6.412(D)(2) provides that

> If, after the examination of any juror, the court finds that a ground for challenging a juror for cause is present, the court on its own initiative *should*, or on motion of either party *must*, excuse the juror from the panel.

Mich.Ct.R. 6.412(D)(2) (emphasis added). In reaching its decision that Michigan did not fully restore a felon's civil right to serve on a jury, the *Driscoll* court noted that the combined effect of Mich.Ct.R. 2.511(D)(2) and 6.412(D)(2) was to require "a court to excuse a juror whenever a challenge for cause clearly falls within one of the enumerated grounds," *Driscoll*, 970 F.2d at 1479 (quoting *People v. Lamar*, 153 Mich.App. 127, 134-35, 395 N.W.2d 262 [1986]); *see also People v. Badour*, 167 Mich.App. 186, 189, 421 N.W.2d 624 ("If a party shows that a prospective juror comes within one of this court rule's enumerated categories, the trial court is without discretion to retain the juror, who must be excused for cause") (citation omitted), and concluded that "[under Michigan law, a felon] would be automatically dismissed from jury service once either party brought his former conviction to the attention of the court in either a civil or criminal case." *Driscoll*, 970 F.2d at 1479. Furthermore, the *Driscoll* court observed that "in a criminal case, Michigan court rules recommend that the trial court dismiss convicted felons on its on [sic] motion." *Id.*

The discretion afforded trial judges in Michigan under Mich.Ct.R. 6.412 [D][2] that is discussed in *Metzger* and *Driscoll* differs from that afforded trial justices in Massachusetts under Mass.Gen.L. ch. 234, § 8. The crucial distinction between the Michigan cases and the case at bar rests upon the subtle difference in the language of the Michigan Court Rules and the corresponding case law and language of sections of chapter 234. Section 8 specifically states that if a person has been convicted of any felony or is deemed to be otherwise unfit for jury service, "he *may* be relieved by [the court] from sitting in any case." Mass.Gen.Laws Ann. ch. 234, § 8 (West 1986). Unlike the state of the law in Michigan, a thorough search of relevant Massachusetts statutes, case law, and rules of court does not disclose any instruction to Massachusetts trial justices that requires them to dismiss persons whose past felonies are disclosed after the seven-year time

period has passed. Rather, the trial justice "may" relieve a person from jury service, but the justice is not forced to do so.[12] Likewise, disclosure of a prior felony conviction

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[12] Absent from this discussion, of course, is any sense of what trial justices in Massachusetts actually do when confronted by the fact that a person with a felony conviction more than seven years old shows up on a jury venire. No Massachusetts practice treatise or continuing legal education pamphlet addresses the matter so far as I am aware.

I do remember what I used to do when I served as a Justice of the Superior Court in the years prior to the enactment of Mass.Gen.Laws ch. 234A and the advent of the "one day or one trial" jury system. In those days, were I the jury judge and were the matter brought to my attention, it was my unvarying practice to excuse the felon juror. Of course, if this is presently the general practice among the justices in the jury sessions of the Massachusetts Superior, District, Housing, and Juvenile Courts, then *Metzger* and *Driscoll* are persuasive authority indeed.

But a personal practice nearly two decades out-of-date is a poor guide for decision making today. This is especially so inasmuch as I recall no discussion of the matter among my Superior Court colleagues, nor can I recall any specific instance of granting (or denying) a specific challenge for cause on this ground in eight years of service on the Superior Court.

Still, as juror challenges are matters of record, it is at least theoretically possible to ascertain a pattern or policy in acting on such challenges in the jury sessions of the various Massachusetts trial courts. Indeed, the creation of electronic data bases that will retain and permit the search and retrieval of such data are possible today in every court session where the court reporter uses computer assisted transcription. This case presents a clear example of the need for such data bases so that the law can consistently be applied on the basis of what courts actually do. *See* Panel Discussion, "Lawyers Online: Discovery, Privilege and the Prudent Practitioner," *Internet Law Symposium*, Boston University, June 20, 1996 (to be published in the Boston University Journal of Science and Technology Law).

is not a ground for a mandatory challenge for cause in a civil or criminal case. Thus, *Metzger* and *Driscoll* do not here control.

In sum, the Massachusetts' juror-disqualification statute is not permanent in nature, for felons regain the opportunity to serve on a jury seven years after conviction. While trial justices in Massachusetts are afforded the discretionary authority to excuse a convicted felon from jury service even after the seven-year redemption period has passed, they are not required to do so. How, then, is Caron to be treated? He is a Massachusetts felon who, having regained his opportunity to serve on a jury, may nonetheless be excused by a trial justice and stripped of his right to serve as a juror as part of a particular venire. Have his civil rights been restored under 18 U.S.C. § 921(a)(20)?

Unfortunately, due to inadequate funding, Massachusetts continues merely to tape record many of its trial sessions, thus frustrating any such analysis as a practical matter. For related problems with tape recording, *see generally Commonwealth v. Tavares*, Cr. No. JC-8725-188, 40 Mass.App.Ct. 1110, 662 N.E.2d 1063 (Mass.Super.Ct. March 24, 1995) (O'Neill, J.) (conviction set aside due to inadequate record); *United States v. Payne*, 894 F.Supp. 534, 537 n. 7 (D.Mass.1995) (noting this problem may be endemic); *United States v. One Ford 198X Mustang, Vehicle Identification No. 1FAB42E5JF290177*, 749 F.Supp. 324, 326 n. 1 (D.Mass.1990) (collecting cases noting problems in appellate review based on tape recordings).

B. *Is Full Restoration or Only Substantial Restoration Required?*

The seminal case on this issue is the Sixth Circuit's opinion in *Cassidy*, where the court wrote

> Our review of the legislative history has not produced a precise statement from Congress identifying the rights that must be restored by a state in order for it to have effected a "restoration of civil rights" for purposes of § 921(a)(20). We are confident, however, based on the general intent of Congress to redirect enforcement efforts against firearms owners that have a demonstrated potential for serious unlawful activity, that Congress envisioned a restoration of more than a de minimis quantity of civil rights. We do not read into the statutory language, however, a requirement that there be a "full" restoration of rights. If Congress had intended a requirement of a complete restoration of all rights and privileges forfeited upon conviction, it could easily have so stated.

Cassidy, 899 F.2d at 549 (footnote omitted). Although the felon in *Cassidy* received his rights to vote, to seek and hold public office, and to serve on a jury after his release from prison, the *Cassidy* opinion did not discuss the extent to which the right to serve on a jury had been restored. Among the cases that do address situations where a felon's right to serve on a jury is precluded by state statutes or rules of court, however, the operative language from *Cassidy* still applies. *See, e.g., Metzger*, 3 F.3d at 759 (ruling that barriers to jury service raised by state rules of court preclude a finding of a substantial restoration of civil rights necessary to satisfy § 921[a][20]); *Driscoll*, 970 F.2d at 1476

("the restoration 'must be substantial, but need not be complete' ") (quoting *Dahms*, 938 F.2d at 133); *United States v. Gomez*, 911 F.2d 219, 221 (9th Cir.1990) ("There need not be a 'full' restoration of rights.") (quoting *Cassidy*, 899 F.2d at 549); *Presley*, 851 F.2d at 1053 (affirming district court's holding that "Congress intended substantial, not total, restoration of civil rights in order to qualify for the exclusion [contained in 18 U.S.C. § 921(a)(20)]"); *Berger*, 867 F.Supp. at 427 ("To render a prior conviction unavailable for consideration in accordance with the civil rights restoration provision of section 921[a][20], the restoration of civil rights need not be complete, 'but it must be substantial.' ") (quoting *Metzger*, 3 F.3d at 758) (other citations omitted).

This Court follows *Cassidy* and its progeny and rules that, in the case at bar, Caron's right to serve on a jury substantially has been restored. Since more than seven years have elapsed with respect to each of the prior convictions that figure in his present sentence, he may be summoned for jury service within his county of residence in the ordinary course. Like any other citizen, he will, in random selection, be empaneled unless either excused by the justice presiding due to his felon status or successfully challenged by a litigant. Indeed, even if excused by the justice presiding, it appears that Caron would be credited like any other juror for having appeared in response to his summons and would thus be exempted – as a serving juror – from further call by the Commonwealth for the succeeding three years. *See* Mass.Gen.Laws Ann. ch. 234, § 2 (West 1985). Thus, Caron's right to sit on

a Massachusetts jury, as well as his other material civil rights, substantially have been restored.[13]

C. *Massachusetts Firearms Restrictions*

1. *The Exception to the Exception*

In 1986, the Firearm Owners Protection Act, Pub.L. 99-308, § 101(5) (1986), specifically defined "crime punishable by imprisonment for a term exceeding one year" in 18 U.S.C. 921(a)(20) by the following language that is here material:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20); *see also lUnited States v. Kolter*, 849 F.2d 541, 543 (11th Cir.1988) (discussing the history of the Firearm Owners Protection Act).

The language of this paragraph of section 921(a)(20) can best be understood as follows: the first clause of the second sentence of the above paragraph – the "shall not" clause – which begins with the words "Any conviction"

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[13] In this conclusion, this Court respectfully disagrees with the decision of the Ninth Circuit in *United States v. Oman*, 91 F.3d 1320 (9th Cir.1996).

and ends with the phrase "purposes of this chapter" creates an exception to the statutory definition of "conviction." The second clause of the second sentence, beginning with the word "unless" and ending with "firearms," carves out an "exception to the exception." Both clauses, read together, *inter alia*, serve to eliminate the sentence-enhancing effect of a felony conviction if the state of conviction determines that the felon shall be made whole, with the proviso that if the state limits the felon's access to firearms in particular ways, the felon's predicate crimes may be counted for the purposes of determining the length of sentence under 18 U.S.C. §§ 922(g)(1) or 924(e). *See Cassidy*, 899 F.2d at 546. As Massachusetts is Caron's state of conviction with respect to this aspect of the analysis, Massachusetts law must be considered to determine whether Caron is subject to the requisite federal firearms restrictions by virtue of his previous criminal convictions. *Id.; see also Driscoll*, 970 F.2d at 1480 (holding that "in cases involving 18 U.S.C. § 922[g][1], federal courts should examine state law solely for the purpose of determining whether the state has restored felons to their full civil rights, including allowing them to possess firearms").

Thus, under the second branch of the two-pronged analytical framework propounded in *Cassidy* and *Dahms*, Caron's earlier predicate crimes may still count pursuant to section 921(a)(20) – despite the substantial restoration of his civil rights – if Massachusetts law "expressly provides that [Caron] may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20); *Dahms*, 938 F.2d at 133; *Cassidy*, 899 F.2d at 549. If Massachusetts law so provides, then Caron's prior felony convictions must be

counted against him, and Caron is therefore subject to the special punishment ordered by Congress in section 924(e)(1) for a felon who possesses a firearm despite three prior felony convictions. *See United States v. Erwin*, 902 F.2d 510, 511 (7th Cir.), *cert. denied*, 498 U.S. 859, 111 S.Ct. 161, 112 L.Ed.2d 127 (1990). In other words, this Court must sentence Caron as an armed career criminal.

Although Congress' primary concern was to look to state law in order to determine convicted felon status under section 921(a)(20), *Cassidy*, 899 F.2d at 548 & 549 n. 11, it is here necessary to determine whether the two jurisdictions – Massachusetts and the United States – speak as one with respect to limiting felons' access to firearms. A thorough review of Massachusetts and federal case law, statutory authority, and legislative history indicates that, as a threshold matter, Massachusetts law is not coextensive with federal law in limiting felons' access to firearms, given the differences in the two jurisdictions' definition of "firearm" and the practical effect of Massachusetts weapons licensing statutes.[14]

[14] For this reason, the Court finds the government's reference to *United States v. Bendolf*, Crim. No. 95-68-LON (D.Del. Aug. 20, 1996) unpersuasive. The key to the analysis in *Bendolf* is its assumption that the term "firearm" as used in the Massachusetts statutes means the same thing as it does under section 921(a)(20). *See Bendolf*, slip op. at 13. Because this Court respectfully differs with that assumption, it is not moved by the *Bendolf* analysis.

2. *Federal Definition of "Firearm"*

Congress adopted Title IV of the Omnibus Crime Control and Safe Streets Act, Pub.L. No. 90-351, 82 Stat. 197 (1968) (relevant provisions of which were codified at 18 U.S.C. §§ 921-928, 1201-1203) (later amended by The Gun Control Act of 1968, Pub.L. No. 90-618, 82 Stat. 1213 (1968) [relevant provisions of which were codified at 18 U.S.C. §§ 921-929] [hereinafter, as amended, the "Gun Control Act"]), the precursor to modern-day federal firearms-possession statutes, in order to "keep firearms out of the hands of those not legally entitled to possess them." S.Rep. No. 1097, 90th Cong., 2d Sess. 2-3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113-14. The term "firearm," as it pertains to all sections contained in Title 18 of the United States Code – including section 921(a)(20) – is defined broadly as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.[15] Such term does not include an antique firearm.

18 U.S.C. § 921(a)(3). The term "weapon" is not defined in the federal statutes.

Under the plain language of this statute a "firearm" is a specific type of weapon, i.e. a subset of the array of items society uses as weapons. Congress meant the term

[15] The definition of the term "destructive device" is provided in section 921(a)(4).

"firearm" to include the entire subset of weapons which can fire, or be made to fire, a projectile out of a barrel with the aid of a propellant, with the specific exclusion of antique firearms, which are defined in another part of section 921(a). Thus, while brass knuckles, black jacks, shivs, knives, swords, spears, lances, arrows, slings, catapults, and ballistas are weapons, they are not firearms. Likewise, crew-served weapon systems such as tanks and artillery are both weapons and firearms. Bazookas are probably firearms; rockets and missiles probably are not. More to the point, long arms such as "rifles" and "shotguns," although defined separately in section 921(a), have been held to be within the statutory definition of "firearm," *United States v. Mitchell*, 557 F.2d 1290, 1291-92 (9th Cir.1977) ("Congress, by using the comprehensive term 'firearm' without qualification, did not intend to remove rifles and shotguns from the reach of [18 U.S.C. § 922(h)]"),[16] as are "handguns" and "semiautomatic

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[16] In *Mitchell*, the defendant attempted to argue that since Congress distinguished rifles and shotguns from other firearms in another section of the federal gun control statute, 18 U.S.C. § 922(b)(1), it meant that distinction to apply to his alleged violation of 18 U.S.C. § 922(h) as well. *Mitchell*, 557 F.2d at 1291. The Ninth Circuit rejected his argument.

Prior to being amended in 1986, 18 U.S.C. § 922(h) provided that it was unlawful for four categories of persons, including a convicted felon, "to receive any firearm or ammunition which has been shipped or transported in interstate commerce." 18 U.S.C.A. § 922(h) (West 1976). Section 922(b)(1) prohibits licensed importers, manufacturers, dealers, or collectors from selling or delivering "any firearm or ammunition . . . other than a shotgun or rifle, or ammunition for a shotgun or rifle" to any individual under 21 years old. 18 U.S.C. § 922(b)(1).

assault weapons." *See* 18 U.S.C. §§ 921(a)(29) and 921(a)(30).

The term "firearm" is so liberally defined that it has been held to include even unloaded, inoperable weapons. *United States v. Gutierrez-Silva*, 983 F.2d 123, 125 (8th Cir.1993); *United States v. Sanza*, 519 F.Supp. 26, 28 (D.Md.1980). Therefore, based upon the Ninth Circuit's holding in *Mitchell* and the unambiguous, all-inclusive language of 18 U.S.C. § 921(a)(3), this Court interprets Congress' reference to the term "firearm" in section 921(a)(20) to mean the entire set of weapons including, but not limited exclusively to, all such weapons as long-arms and handguns.

3. *Massachusetts' Definition of "Firearm"*

Quite unlike the federal government, Massachusetts but narrowly defines the term "firearm." Under Massachusetts law, the term "firearm" as it applies to all state gun-control statutes is defined as

> A pistol, revolver or other weapon of any description loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than sixteen inches or eighteen inches in the case of a shotgun as originally manufactured. . . .

Mass.Gen.Laws Ann. ch. 140, § 121 (West 1991). Section 121 also separately defines "rifle," "shotgun," "sawed-off shotgun," and "machine gun" as weapons with varied individual characteristics. *Id.* (applying definitions to Mass.Gen.L. ch. 140, §§ 122-131F). The term "weapon" is not defined.

Based upon this definition of firearm, it appears that firearms in Massachusetts, although classified as a subset of a larger group of weapons, generally comprise a particular type of weapon: those weapons with a barrel length of less than sixteen inches, i.e., hand guns. Furthermore, Massachusetts law – unlike federal law – draws a clear distinction between firearms (i.e., handguns) and rifles, shotguns, and machine guns, separately defining each into mutually exclusive subsets of the general array of weapons. For example, a "rifle" is defined as "a weapon having a rifled bore with a barrel length equal to or greater than sixteen inches," while a "shotgun" is "a weapon having a smooth bore with a barrel length equal to or greater than eighteen inches." Mass.Gen.Laws Ann. ch. 140, § 121 (West 1991). In fact, Massachusetts distinguishes between firearms (i.e. handguns) and rifles and shotguns in nearly every section of its firearms sale and licensing statute, codified at Mass.Gen.L. ch. 140, §§ 122-131F. *See, e.g.*, Mass.Gen.L. ch. 140, §§ 122 (license requirements to sell weapons), 123 (conditions of licenses), 126 (signage requirements for gunsmiths), 128 and 128A (penalties for illegal sale or lease of weapons), 128B (unauthorized use of firearms), 129 (penalties for falsely declaring information).

4. *The Difference Between the Federal and Massachusetts Regulatory Schemes; Effect on the Instant Case*

The difference between the federal definition of "firearm" and the corresponding Massachusetts definition is crucial. The federal statute, 18 U.S.C. § 922(g)(1), prohibits firearms possession by a felon, and section 924(e)

enhances the sentence imposed for violating section 922(g) if the felon has three previous felony convictions. According to section 921(a)(20), however, a prior felony conviction is not a conviction if, *inter alia*, the state of conviction restores the felon's civil rights, *unless* that state expressly restricts the felon's access to "firearms." Thus, if state law prohibits the "ship[ping], transport[ing], possess[ion], or recei[pt]" of the range of weapons referred to in the *federal* definition of "firearm," then the previous conviction qualifies, and the predicate offense may be counted toward the three offense total as specified in section 924(e).

Since there is a difference between Massachusetts' definition of "firearm" and the federal definition of "firearm," the real issue to be resolved in order to determine the range of Caron's sentence under the second prong of the *Cassidy* analysis is whether Massachusetts law restricts a felon's access to federal "firearms" to the degree intended by Congress when it drafted section 921(a)(20).

"The goal of firearms control legislation in Massachusetts is to limit access to deadly weapons by irresponsible persons." *Ruggiero v. Police Comm'r*, 18 Mass.App.Ct. 256, 258, 464 N.E.2d 104, *review denied by* 392 Mass. 1104, 466 N.E.2d 522 (1984). This goal is accomplished through the implementation of a comprehensive regulatory scheme which requires aspiring gun owners potentially to obtain three separate documents – a firearm identification card, a license to carry, and a permit to purchase.

a. *Firearm Identification Cards: Mass.Gen.L. ch. 140, § 129B*

The issuance of firearm identification cards is governed by Mass.Gen.L. ch. 140, § 129B. According to section 129B, a felon is entitled to receive a firearm identification card if five years have passed since conviction or release from confinement:

> Any person . . . may submit to the licensing authority [an] application for a firearm identification card, *which such person shall be entitled to, unless* the applicant (a) has within the last five years been convicted of a felony in any state or federal jurisdiction, or within that period has been released from confinement where such person was serving a sentence for a felony conviction. . . .

Mass.Gen.Laws Ann. ch. 140, § 129B (West 1991) (emphasis supplied).

Firearm identification cards by themselves may be obtained as "matter of right." *Commonwealth v. Landry*, 6 Mass.App.Ct. 404, 406, 376 N.E.2d 1243 (1978). A valid firearm identification card, without any other documentation, allows the holder lawfully to own or possess a firearm (i.e. a handgun), rifle, or shotgun. *See* Mass.Gen.Laws Ann. ch. 140, § 129C (West 1991) (making it illegal for anyone other than a licensed dealer or "one who has been issued a license to carry a pistol or revolver" to own or possess any handgun, rifle, or shotgun without also possessing a firearm identification card); Mass.Gen.Laws Ann. ch. 269, § 10(a) (West 1991) (criminalizing possession of handguns, rifles, and shotguns without possessing a valid firearm identification

card); *see also Commonwealth v. Morse*, 12 Mass.App.Ct. 426, 428, 425 N.E.2d 769 (1981); *Landry*, 6 Mass.App.Ct. at 405, 376 N.E.2d 1243 (finding that "a firearm identification card . . . authorizes the holder to 'own or possess' a firearm," but remaining silent about rifles or shotguns) (citation omitted). Thus, in Massachusetts, felons such as Caron may obtain a firearm identification card, which in turn allows the holder lawfully to possess firearms (i.e. handguns), rifles, shotguns, and ammunition.[17]

b. *License to Carry Firearms: Mass.Gen.L. ch. 140, § 131*

Individuals who qualify for a firearm identification card, however, may not lawfully carry a firearm (which is defined by Mass.Gen.L. ch. 140, § 131 as a handgun) on their person or under their control in a vehicle unless they also have a license to carry obtained under section 131 or are otherwise exempt from the licensing requirements. Mass.Gen.Laws Ann. ch. 269, § 10(a) (West 1990); *see also* Mass.Gen.Laws Ann. ch. 140, § 129C (West 1991)

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[17] Indeed, at Caron's trial, there was testimony to the effect that in June 1991, after learning that he was eligible for a firearm identification card – despite his status as a felon – Caron applied for *and received* a firearm identification card. *Caron I*, 64 F.3d at 714. He understood the state of the law in Massachusetts to be that possession of the firearm identification card permitted him to purchase and possess guns, albeit solely within the confines of his home or place of business. *See id.* In 1993, federal agents seized a .22 caliber rifle and 185 rounds of ammunition from Caron, and subsequently seized six additional rifles and shotguns and over 6,500 rounds of ammunition from his place of residence. *Id.*

("The possession of a firearm identification card issued under section [129B] shall not entitle any person to carry a firearm in violation of [ch. 269, § 10]."); *Commonwealth v. Ramirez*, 407 Mass. 553, 558, 555 N.E.2d 208 (1990) (citing *Commonwealth v. Seay*, 376 Mass. 735, 737, 383 N.E.2d 828 [1978]); *Landry*, 6 Mass.App.Ct. at 406, 376 N.E.2d 1243 (citing ch. 269, § 10[a]). This requirement comports with the intention of the Massachusetts Legislature. *Landry*, 6 Mass.App.Ct. at 406, 376 N.E.2d 1243 ("[T]he [Massachusetts] Legislature intended to condition the carrying of a firearm on compliance with the licensing requirements . . . more stringent than those of G.L. c. 140, s. 129B"). The statutory restrictions on carrying rifles and shotguns are far more relaxed: valid firearm identification cardholders may carry a rifle or shotgun on their person or under their control in a vehicle. Mass.Gen.L. ch. 269, § 10(a)(4) subpar. (3); *Landry*, 6 Mass.App.Ct. at 406, 376 N.E.2d 1243. Valid firearm identification cardholders may, however, carry any firearm (i.e. handgun) within their residence or place of business without violating the law. *Ramirez*, 407 Mass. at 558, 555 N.E.2d 208; *Seay*, 376 Mass. at 742, 383 N.E.2d 828 (holding that Massachusetts licensing laws contain an implicit exemption from criminal liability for one who has a firearm identification card and carries a firearm within his residence or place of business).

Chapter 140, section 131 has been called a "first-line measure in [Massachusetts'] regulatory scheme." *Ruggiero*, 18 Mass.App.Ct. at 259, 464 N.E.2d 104. It governs

the issuance of licenses to carry handguns.[18] Although any resident of the Commonwealth may apply for a license to carry, Massachusetts law explicitly states that convicted felons may not obtain such a license. The relevant language is as follows:

> After [an investigation into the criminal record and mental history of the applicant] has been completed, [the issuing authority] may, *except for . . . a person who has been convicted of a felony* . . . issue to a person . . . a license to carry firearms [i.e., handguns] in the commonwealth.

Mass.Gen.Laws Ann. ch. 140, § 131 (West 1991) (emphasis added). Convicted felons in Massachusetts are similarly prohibited from obtaining licenses "to sell, rent or lease firearms [i.e., handguns], rifles, shotguns or machine guns, or to be in business as a gunsmith," Mass.Gen.Laws Ann. ch. 140, § 122 (West 1991); obtaining licenses to sell ammunition, Mass.Gen.Laws Ann. ch. 140, § 122B (West 1991);[19] and retaining any licenses granted pursuant to

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[18] Chapter 140, section 131 is titled "License to carry or possess firearms." Both parties agreed at a hearing before this Court that section 131 applies only to handguns and not to shotguns and rifles. *See* Defendant's Note Concerning the Definition of "Firearm" as the Term is Used in G.L. c. 140, § 131 at 1. Caron was convicted of possessing rifles, shotguns and ammunition in violation of 18 U.S.C. § 922(g)(1). *Caron II*, 77 F.3d at 1.

[19] In *United States v. Fortes*, Crim. No. 95-10383-GAO (D.Mass. July 24, 1996) (supplemental ruling) (Doc. No. 72), Judge O'Toole ruled that under chapter 140, section 122, felons in Massachusetts were "permanently disqualified from being licensed to possess firearms" and thus the "restoration of civil rights" provision of section 921(a)(20) could not apply. This

section 122, Mass.Gen.Laws Ann. ch. 140, § 125 (West 1991).

c. *Permits to Purchase Firearms: Mass.Gen.L. ch. 140, § 131A*

Chapter 140, section 131A regulates the purchase of firearms, requiring persons who qualify for a license to carry a handgun under section 131 to apply for a permit before purchasing a handgun. Heavily dependent upon the strictures propounded in section 131, section 131A provides, in relevant part, the following:

> A licensing authority under [§ 131], upon the application of a person qualified to be granted a license thereunder by such authority, may grant to such a person, . . . a permit to purchase, rent or lease a firearm [i.e., handgun] if it appears that such purchase, rental or lease is for a proper purpose, and may revoke such permit at will.

Court's analysis suggests otherwise. Respectfully, chapter 140, section 122 deals not with licenses to possess firearms but with licenses to "sell, rent or lease firearms, rifles, shotguns or machine guns." Mass.Gen.Laws Ann. ch. 140, § 122 (West 1991). As mentioned earlier, chapter 140, section 131 addresses the requirements for a license to carry firearms within the Commonwealth. "[F]irearms" as used in that statute refers solely to handguns, not shotguns or rifles. Like *Estrella*, the holding in *Fortes* may be reconciled with the holding in this case. Fortes had no firearms identification card, thus making his possession illegal under Massachusetts law. Caron, in contrast, had a firearms identification card and his conduct was entirely lawful under Massachusetts law.

Mass.Gen.Laws Ann. ch. 140, § 131A (West 1991). *See also generally Ruggiero*, 18 Mass.App.Ct. at 257, 464 N.E.2d 104; *Commonwealth v. Sampson*, 383 Mass. 750, 758, 422 N.E.2d 450 (1981) (explaining role of § 131A permits in Massachusetts gun regulatory scheme); *Commonwealth v. Seay*, 376 Mass. 735, 740-41, 383 N.E.2d 828 (1978) (explaining Massachusetts gun licensing laws).

Under the statutes of this Commonwealth, therefore, a felon, provided the requisite five-year waiting period has expired and as long as he does not traffick in firearms as defined under Massachusetts law, is able to: (1) obtain a firearm identification card pursuant to Mass.Gen.L. ch. 140, § 129B; (2) purchase a shotgun or rifle since the constraint on obtaining a permit to purchase under chapter 140, § 131A applies only to handguns; (3) possess handguns, rifles, or shotguns at his home; and (4) carry rifles or shotguns upon his person or in his car. Under federal statutes, if the felon were to attempt the latter three acts with any firearm of any sort – rifle, shotgun, or handgun – he could (if other requirements are met, see section D, below) be convicted under section 922(g)(1). Yet, under the gun laws of the Commonwealth of Massachusetts, the felon's actions are perfectly legal.

As applied to this case, therefore, Caron had every legal right under Massachusetts law to obtain a firearms identification card and, once he possessed it, to keep and carry rifles and shotguns. As a felon, however, this very conduct appeared to violate federal law and it is for this violation that he stands convicted. As Massachusetts has both substantially restored Caron's civil rights and has not expressly prohibited Caron from shipping or transporting (through another) or possessing or receiving

rifles or shotguns, he may not be sentenced as an armed career criminal.

This conclusion is buttressed by the decision of some courts of appeal that there must be an explicit statement by the state legislature before the exception to the exception in 18 U.S.C. § 921(a)(20) can be applied. *See, e.g., United States v. Gomez*, 911 F.2d at 221-22 ("[T]he provision restricting the convicted felon's right to . . . possess or receive forearms must be express."); *United States v. Erwin*, 902 F.2d 510, 513 (7th Cir.1990) ("A state must tell the felon *point blank* that weapons are not kosher") (emphasis added). In *Gomez*, the Ninth Circuit was persuaded by the "crucial fact" that Idaho had no state statute at all prohibiting felons from possessing firearms. *Gomez*, 911 F.2d at 222. Massachusetts law contains such statutes, and *Gomez* is thus distinguishable from this case, but Massachusetts does not – and this is crucial here – prohibit Caron from possessing the rifles and shotguns that formed the basis for his federal conviction.

The Court acknowledges, as it must, that Chief Judge DiClerico faced precisely the same question of the interrelation between the federal and Massachusetts gun control legislation in *United States v. Estrella*, Crim. No. 95-81-01-JD, slip op. (D.N.H. Apr. 3, 1996) (DiClerico, C.J.) – and reached a contrary conclusion. That is, *Estrella* stands for the proposition that, although Massachusetts substantially restores a felon's civil rights seven years after conviction (this point was conceded by the government in *Estrella*, see note 10 above), it sufficiently restricts a felon's access to firearms such that the exception to the exception applies. Accordingly, Chief Judge DiClerico ruled that the state felony conviction at issue provided a

proper basis for a federal conviction under 18 U.S.C. § 922(g). *Id.* at 7. This Court respectfully reaches a different conclusion based on the definitional distinctions as between federal and Massachusetts law and, within Massachusetts law, as between rifles and shotguns and handguns.

The result in Estrella and the decision herein can, however, be harmonized. *Estrella* was convicted as a felon-in-possession of a weapon that the laws of Massachusetts expressly forbid him to possess without a firearms identification card. Such a harmonization, however, carries with it attendant complexities – i.e., that Massachusetts felons with three prior qualifying convictions who have had their civil rights restored but who thereafter possess weapons without a firearms identification card may be sentenced as armed career criminals, while identically situated felons with a firearms identification card who possess rifles and shotguns (and handguns in their homes) may not. This court need not assay such a harmonization in this case, for it suffices to hold that Massachusetts has not sufficiently proscribed Caron's association with firearms such that he may be sentenced as an armed career criminal in federal court.

D. *Resentencing? The Law of Unintended Consequences*

The First Circuit concluded its opinion in *Caron II* with the order: "The judgment [upon Caron] is vacated and the matter remanded to the district court for resentencing." The clear import of this mandate is that Caron will remain subject to some lawful sentence. It is the

range of the appropriate sentence that has been the focus of the parties' dispute during the hearings on remand, i.e. either the 15-22$^{2}/_{3}$ years range (the range between the fifteen year minimum mandatory sentence required by the Armed Career Criminal Act up to the sentence required by the Sentencing Guidelines and earlier imposed by this Court) or the 37 months to 10 years range (the sentence required by the interplay of the minimum sentence permitted by the Sentencing Guidelines and the statutory maximum for the offense of being a felon-in-possession).

The analysis herein, however, leads inexorably to the conclusion that, once *Caron II* reversed the *Ramos* doctrine that only individualized treatment could restore a felon's civil rights, at that very moment, were Caron's offenses against the laws of Massachusetts alone, his indictment would become a nullity *ab initio* and thus subject to dismissal. In these circumstances, it would appear that Caron ought now be set at liberty. This is a remarkable result, apparently not contemplated by the First Circuit and in fact not urged upon the Court by any party. Still, were Caron's record from Massachusetts alone, such a result would be compelled by the undisputed facts on this record.

The confusion appears to stem from our too glib reference to the offense of conviction as the offense of being "a felon in possession of a firearm." Caron is, of course, a felon in the common law sense, i.e. he has been convicted of offenses which carry a potential sentence of more than one year in prison. Congress has not left it at that, however. In 18 U.S.C. § 921(a)(20) Congress provides

expressly that "the term 'crime punishable by imprisonment for a term exceeding one year' does not include – [the exception with the exception to the exception]" that have been the focus of part II of this opinion. (emphasis added) Moreover, this definition applies not only to the determination of what constitutes a predicate offense for the purpose of sentence enhancement, *see* 18 U.S.C. § 924(e), it defines the offense of conviction as well. *See* 18 U.S.C. § 922(g). Just as Caron is no longer a felon for the purpose of enhancing his offense of conviction, so too – at least as to his Massachusetts convictions – he is not a felon for the purpose of offending against the felon-in-possession statute itself.

Consider the following: Caron's most recent felony conviction took place on April 30, 1979. He received a two year suspended sentence for unlawfully dealing in, possessing, and transferring firearms.

Five years later, on April 30, 1984, Caron became eligible once again to have a Massachusetts firearms identification card issued to him as matter of right.

On April 30, 1986, seven years after his last felony conviction, Caron had the last of his civil rights – the right to sit on a Massachusetts jury – substantially restored. At this point, his status was – What? A felon at common law, he no longer fit the Congressional definition found in 18 U.S.C. § 921(a)(20). As to his Massachusetts record at least, Caron was then an **ex-felon** for the purposes of federal law.

In June, 1991, Caron applied for and received a Massachusetts firearms identification card, thus making lawful (under Massachusetts law) his possession of the rifles and shotguns seized by federal agents in 1993.

On February 10, 1994, Caron was indicted in this Court for various violations of 18 U.S.C. § 922(g)(1), all stemming from his status as a federally-defined "felon." Yet, he was not.

True, for the seven years following April 30, 1979, he was, in fact, a federally-defined "felon." But on that date, April 30, 1986, Caron became, as to his Massachusetts record, an **ex-felon** – and there is simply no offense of being an "**ex-felon**-in-possession."[20]

The Ninth Circuit confronted a similar issue in *Dahms*, 938 F.2d 131 (9th Cir.1991). Dahms pleaded guilty in Michigan state court to a felony. After his release, he was subsequently convicted in Montana of violating section 922(g)(1) for being a felon in possession of a firearm, specifically a shotgun. *Id.* at 132. Upon appeal, the Ninth Circuit reversed the conviction, holding that Dahms should not have been indicted under section 922(g)(1) because he was not a convicted felon according to section 921(a)(20). As part of its analysis, the *Dahms* court examined Michigan state law and determined that although Michigan restricted an ex-felon's right to possess pistols,

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[20] Of course, under *Ramos*, Caron's status as a federally-defined felon was precisely correct as he had never received any individualized Massachusetts pardon. Therefore, under the law as it stood at the time of Caron's indictment and conviction, the proceeding against him was entirely lawful. Everything changed, however, when *Ramos* was reversed in *Caron II*.

his right to possess a shotgun remained intact. *Id.* at 135 (interpreting Mich.Comp.Laws § 28.422 [1989]). This fact, combined with Michigan's distinction between pistols and shotguns in a separate concealment statute, proved crucial in the court's determination that Michigan did not intend to restrict a felon's ability to possess all types of firearms. *Id.* (comparing Mich.Comp.Laws § 28.422 [licensing statute] with Mich.Comp.Laws § 750.222[a] [concealment statute]). In conclusion, the court stated: "To apply § 922(g)(1) and conclude that Dahms' right to possess any firearm was restricted under federal law because the state restricted his possession of a pistol would undermine the explicit deference to state law in § 921(a)(20)," which Congress intended. *Id.*

The Ninth Circuit's approach in *Dahms* has been criticized by the Sixth Circuit in *United States v. Driscoll*, 970 F.2d 1472 (6th Cir.1992), *cert. denied*, 506 U.S. 1083, 113 S.Ct. 1056, 122 L.Ed.2d 362 (1993). Similar to the defendant in *Dahms*, Driscoll was convicted of violating section 922(g)(1) for possessing a shotgun. Analyzing the same Michigan laws as in *Dahms*, the *Driscoll* court interpreted section 922(g)(1) as creating an "all or nothing" approach to the possession of firearms by ex-felons: "[u]nder federal law, a person is either treated as a convicted felon, and thus prohibited from carrying any firearms, or is treated as though he had a clean record, and thus allowed to carry all legal firearms." *Id.* at 1480-81. The court emphatically stated that "the idea that Congress intended to treat various weapons differently within the same state simply contradicts the plain language of federal law," and therefore "refuse[d] to allow the intricate details of state

law to override a fairly straightforward federal plan." *Id.* at 1481.

The problem with the Sixth Circuit's "all or nothing" approach is that in section 921(a)(20) Congress *has* allowed the "intricate details of state law" to interfere with its federal plan. By the plain language of section 921(a)(20) as interpreted by *Cassidy* and other courts throughout the land, Congress ceded to the states the ability to determine whether the definition of conviction in 921(a)(20) applies to a particular felon. That cession of power to the states makes state law on the issue determinative. Although the First Circuit did not opine on the matter in *Caron II*, at least four other circuit courts of appeal have. *See, e.g., Dahms*, 938 F.2d at 135 (9th Cir.1991); *United States v. Burns*, 934 F.2d 1157, 1160-61 (10th Cir.1991), *cert. denied*, 502 U.S. 1124, 112 S.Ct. 1246, 117 L.Ed.2d 478 (1992); *Cassidy*, 899 F.2d at 546 (6th Cir.1990) ("we . . . must look to the whole of state law . . . to determine if [a felon's] firearms privileges have been expressly restricted"); *McLean*, 904 F.2d 216, 218 (4th Cir.1990), *cert. denied*, 498 U.S. 875, 111 S.Ct. 203, 112 L.Ed.2d 164 (1990) (following Cassidy). In looking to the whole of state law, then, this Court must also look to the state definition of "firearm" and determine how such weapons are treated under *state* law. In sum, in enacting section 921(a)(20), Congress intended "deference to state law with respect to the federal firearms privileges of persons convicted in that state." *McLean*, 904 F.2d at 218 (quoting *Cassidy*, 899 F.2d at 549). That this deference would create a hodgepodge of variable state firearms restrictions was clearly recognized by Congress, as shown by the following statement of Senator Durenberger of

Minnesota during debate over the Firearm Owners Protection Act in 1986:

> In the State of Minnesota, a convicted felon's civil rights are automatically restored when his sentence expires. Therefore, under the new federal law, it will no longer be a violation of the Federal Gun Control Act of 1968 for a Minnesotan convicted of a felony to possess a firearm after his sentences has expired. The same will be true in each State which automatically restores a convicted felon's civil rights. This creates a problem in my State. The ironic, unintended side effect of this 'glitch in the gun law' is to turn a law intended to crack down on crime into a law that could abet crime unless Minnesota changes its law regarding the civil rights of felons. . . .

132 Cong.Rec. S14,974 (daily ed. October 3, 1986) *cited in Cassidy*, 899 F.2d at 548-49. So it is.

But there is more – and on the issue of whether Caron is a federally-defined "felon" as of the date of his indictment, the United States and California felony convictions must also be considered. It is here that Caron comes acropper.

III. ANALYSIS OF FEDERAL LAW

The issue of "whether a federal felon cannot have his civil rights restored under federal law . . . is a complicated question, one which involves the interpretation of federal law relating to federal rights." *Beecham*, ___ U.S. at ___ n. * *, 114 S.Ct. at 1672 n. * *. As noted above, for the purposes of section 921(a)(20), "civil rights" include "the

right to vote, the right to seek and hold public office, and the right to serve on a jury." *Caron*, 77 F.3d at 2.

First, notwithstanding the federal conviction, Caron is eligible to vote in federal elections. Congressional electors in each state have the qualifications requisite for electors of the most numerous branch of the state legislature. U.S. Const., art. I, § 2, cl. 1 (House of Representatives); U.S. Constitution., amdt. XVII (Senate). In other words, if one may vote for a state legislator, then one may vote for Senator or Representative. As was noted earlier, Massachusetts does not disqualify an elector for state offices because of the elector's criminal history. *See* supra, II.A. Further, this prong of the test satisfies the *Beecham* court's requirement that defendant's civil rights be restored by the appropriate jurisdiction. While the specifics of elector qualifications are set by the state, the authority for the qualifications arises from the United States Constitution. *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915); *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884).

Second, the Constitution is the sole source of eligibility for President of the United States and it does not preclude felons. U.S. Const., art. II, § 1, cl. 5; *see also Gordon v. Secretary of State of N.J.*, 460 F.Supp. 1026 (1978) (in which the plaintiff was a lawful candidate for President while incarcerated). While it is true that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members," U.S. Const., art. I, § 5, the Supreme Court has held that "the Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the

Constitution," with the annotated observation that the same must hold true for the Senate. *Powell v. McCormack*, 395 U.S. 486, 522 & n. 44, 89 S.Ct. 1944, 1964 & n. 44, 23 L.Ed.2d 491 (1969). Although Caron could not have held a public office while in jail, *see* Mass.Gen.Laws Ann. ch. 279, § 30 (West 1981), he is now eligible for any federal elected office. Therefore, no standing rule bars Caron's ability to run for and serve in congressional office.

As a convicted felon, however, Mr. Caron has lost for all time his right to serve on a federal jury, and the loss of this crucial civil right – the right to participate in that most vital expression of direct democracy in America today, *Alexis v. Leporati*, Civ. No. 93-10003, 1996 WL 463675, at *2 (D.Mass. July 30, 1996), *In Re Acushnet River & New Bedford Harbor*, 712 F.Supp. 994, 1006 (D.Mass.1989), service on the nation's juries – is fatal to any claim by Caron that he was not a federally-defined felon at the time of his indictment.

Pursuant to 28 U.S.C. § 1865(b), a potential federal juror is excluded from service if he

> (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.[21]

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[21] The Jury Plan for the United States District Court for the District of Massachusetts as amended (1989) inserts the phrase "have been lost and" after the words "civil rights" in this disqualification. This minor drafting change is of no consequence to this analysis.

"This disqualification is intended to assure the 'probity' of the jury. It is rationally based, and hence is not unconstitutional." *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir.1979) (Gignoux, J.) (citations omitted; emphasis added).

In the First Circuit, 18 U.S.C. § 1865(b)(5) is read as a blanket disqualification of felons for jury service, *United States v. Uribe*, 890 F.2d 554, 561 (1st Cir.1989) ("28 U.S.C. § 1865[b][5] . . . bars certain felons from acting as jurors"); *Foxworth*, 599 F.2d at 4 (1979); and is so implemented.[22]

The Fifth Circuit approach is somewhat different. There the felony conviction does not render a person incompetent to serve as a juror, though such a juror, if seated, is subject to challenge for cause. *Ford v. United States*, 201 F.2d 300, 301 (5th Cir.1953). The Eastern District of Michigan follows this approach. Paul J. Komives & Peggy Blotner, Loss and Restoration of Civil Rights Affecting Disqualification for Federal Jury Service, 70 Mich.B.J. 542 (June 1991) ("Restoration of Civil Rights").

Either way, the impairment of Caron's civil right to sit on a federal jury is substantial. *Cf. Metzger*, 3 F.3d at 759; *Driscoll*, 970 F.2d at 1478-79.

Moreover, unlike the case law interpreting 18 U.S.C. § 922(a)(20), restoration of civil rights under 28 U.S.C.

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[22] The Court takes judicial notice, Fed.R.Evid. 201, that in the District of Massachusetts, felons whose civil rights have not been restored, *see* Federal Court Juror Qualification Questionnaire, questions 5-7, are uniformly excluded from jury service, not even being summoned to appear in the venire for possible empanellment.

§ 1865(b)(5) is uniformly held to require an "affirmative act recognized in law" with respect to the specific felon before such a person can qualify for federal jury service. *United States v. Hefner*, 842 F.2d 731, 732 (4th Cir.), *cert. denied*, 488 U.S. 868, 109 S.Ct. 174, 102 L.Ed.2d 144 (1988); *Viverito v. Levi*, 395 F.Supp. 47, 48 (N.D.Ill.1975) (satisfactory termination of probation imposed by federal court restored citizenship rights to extent effected by Illinois law, but did not restore citizenship rights controlled by federal law). *See* Komives & Blotner, Restoration of Civil Rights at 546.

By virtue of his federal convictions, therefore, Caron is ineligible to serve on a federal jury. This, in turn, means that his federal civil rights have not adequately been restored pursuant to 18 U.S.C. § 921(a)(20). Accordingly, Caron is now and, more importantly, was at the time of the instant crime and indictment, a federally-defined felon. Thus, this already over long opinion need not continue with an analysis of the current status of Caron's civil rights in California in light of his conviction for attempted murder in that jurisdiction.

IV. CONCLUSION

For the reasons stated above, Caron cannot be resentenced as an armed career criminal. The Clerk will schedule a hearing so that he may be resentenced on the offense of conviction.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2338

UNITED STATES,
Appellee,

v.

GERLAD R. CARON,
Defendant, Appellant.

No. 96-2339

UNITED STATES,
Appellant,

v.

GERALD R. CARON,
Defendant, Appellee.

Before

Torruella, *Chief Judge*,
Stahl and Lynch, *Circuit Judges*.

ORDER OF COURT

Entered May 9, 1997

These cross-appeals arise from the resentencing of Gerald R. Caron which occurred on remand from this Court's *en banc* decision in *United States v. Caron*, 77 F.3d 1 (1st Cir.), *cert. denied*, 116 S. Ct. 2569 (1996). The district

court concluded that Caron may not be sentenced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), because his prior Massachusetts convictions should not be counted as predicate crimes pursuant to 18 U.S.C. § 921(a)(20). *United States v. Caron*, 941 F. Supp. 238, 241-51 (D. Mass. 1996). The latter determination was based, in part, on the finding that "Caron had every legal right under Massachusetts law to obtain a firearms identification card and, once he possessed it, to keep and carry rifles and shotguns." *Id.* at 251. After concluding that it could not impose an ACCA sentence, the district court departed upward from the guideline sentencing range applicable to Caron as a non-ACCA defendant and imposed a prison term of ten years.

After the district court resentenced Caron, this court decided *United States v. Estrella*, 104 F.3d 3 (1st Cir. 1997). In *Estrella*, we adopted an "all or nothing" approach under which a conviction counts within the meaning of § 920(a)(20) if the state continues in any way to restrict significantly the ex-felon's right to ship, transport, possess, or receive firearms. *Estrella*, 104 F.3d at 8. We also held that "Massachusetts' ban on handgun possession by ex-felons outside the home or business is a substantial enough limit on firearms rights to preserve the federal ban." *Id.*

We are persuaded that *Estrella* requires reversal of the district court's determination that Caron's Massachusetts convictions do not count as predicate crimes. Contrary to Caron's suggestion, we do not think *Estrella* is distinguishable on the ground that Caron possessed a Massachusetts firearms identification card. This card gave Caron only limited firearms privileges under state law,

and does not distinguish him from the "ordinary Massachusetts felon" whom we stated is subject to the federal ban. *Estrella*, 104 F.3d at 8.

It follows that Caron must be resentenced as an armed career criminal. This decision renders moot Caron's appeal from the district court's upward departure. Accordingly, Caron's appeal is dismissed. The district court judgment is vacated and the case is remanded for resentencing consistent with this opinion. *See* Loc. R. 27.1.

By the Court:

WILLIAM H. NG
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2338

UNITED STATES,
Appellee,

v.

GERALD R. CARON,
Defendant, Appellant.

Before

Torruella, *Chief Judge*,
Selya, Boudin, Stahl* and Lynch, *Circuit Judges*.

ORDER OF COURT

Entered: August 11, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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*Judge Stahl Dissenting.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Vincent F. Flanagan,
Acting Clerk.

By JANICE M. O'NEIL
Chief Deputy Clerk.

[cc: Messrs: Walker, Kelly and Ms. Chaitowitz]

**United States Court of Appeals,
First Circuit.**

UNITED STATES of America, Appellee.

v.

**Lawrence ESTRELLA, Defendant,
Appellant.**

No. 96-1625.

Heard Nov. 5, 1996.

Decided Jan. 9, 1997.

Before CYR, BOUDIN and LYNCH, Circuit Judges.

BOUDIN, Circuit Judge.

Lawrence Estrella was convicted of being a "felon in possession" of a firearm in violation of 18 U.S.C. § 922(g)(1) and sentenced as an armed career criminal. *Id.* § 924(e)(1). His appeal raises various issues, the most difficult being whether he is excepted from the felon-in-possession statute as one whose civil rights have been restored and whose right to firearms has not been significantly restricted under state law. *Id.* § 921(a)(20).

Estrella's long criminal record began in 1967 when he was 17 years old. Pertinently, in January 1977, he pled guilty in Massachusetts state court to assault and battery with a dangerous weapon (a motor vehicle) and received a prison sentence of 3 to 10 years. He escaped from custody on July 2, 1978, and proceeded to commit crimes in two different states for which he was convicted in 1980: armed robbery and armed assault in Massachusetts, and breaking and entering an occupied dwelling in Michigan.

Estrella received a 10-to-15 year prison sentence for the Massachusetts armed robbery and assault, and a concurrent 7-to-15 year prison term for the Michigan crime. On September 28, 1987, Estrella was released from Massachusetts state prison and placed on parole until the year 2003, later reduced to June 1, 1999. He moved to New Hampshire in 1990 and his parole supervision was transferred to New Hampshire. He now had three "violent felony" convictions on his record. 18 U.S.C. § 924(e)(1).

On February 16, 1994, Estrella went to a federally licensed firearms dealership in Goffstown, New Hampshire, and purchased a .25 caliber semi-automatic pistol, allegedly as a gift for his wife. The owner of the dealership had received the gun from a distributor in Massachusetts. In the course of the purchase, Estrella completed an ATF Firearms Transaction Record, *see* 27 C.F.R. § 178.124(c); on it he answered, inaccurately, that he had not been convicted of a crime punishable by a term exceeding one year.

Having learned of the purchase from the local police chief in Estrella's town, agents of the Bureau of Alcohol, Tobacco and Firearms obtained a warrant to search Estrella's residence for firearms and related documents. A search of Estrella's home occurred on March 8, 1994. Estrella arrived during the search, and on being advised of the warrant, Estrella said he wanted to cooperate and signed a waiver of his *Miranda* rights. He then escorted the agents to his garage and showed them where the pistol was located.

A federal grand jury indicted Estrella as a felon in possession, 18 U.S.C. § 922(g)(1), and for making a false

statement in the purchase of a firearm, *id.* § 922(a)(6). Related New Hampshire state charges were dismissed and Estrella was tried in federal court in September 1995. The jury convicted Estrella of violating section 922(g)(1), but deadlocked on the section 922(a)(6) count, which the government later abandoned. Because of his three violent-felony convictions, Estrella was sentenced to 216 months imprisonment. He now appeals.

At the outset we reject, as an issue settled in this circuit, Estrella's argument that section 922(g) facially exceeds Congress' power under the Commerce Clause. *United States v. Blais*, 98 F.3d 647, 649 (1st Cir.1996). Estrella's "as-applied" challenge also fails, because the government offered evidence that the pistol he purchased had moved in interstate commerce. Our precedent also forecloses Estrella's cursory Tenth Amendment challenge to the federal firearm regulations. *United States v. Minnick*, 949 F.2d 8, 10-11 (1st Cir.1991), *cert. denied*, 503 U.S. 995, 112 S.Ct. 1698, 118 L.Ed.2d 408 (1992).

The main question, which we consider *de novo*, is whether federal law prohibited Estrella from obtaining the pistol. 18 U.S.C. § 922(g)(1) makes it unlawful for

> any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [to] possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

But 18 U.S.C. § 921(a)(20) excepts from the definition of conviction

> [a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

But for this exception, Estrella fell within the main ban of section 922(g)(1); the troublesome issues are whether he had his civil rights restored and, if so, whether the "unless" clause applies in his case.

We consider first whether Massachusetts, the jurisdiction of the "predicate offense," had restored Estrella's civil rights. (The government relied on Estrella's Michigan conviction only as a predicate offense for sentencing under section 924(e)(1), and not in his indictment for violating section 922(g)(1).) In this circuit, the civil rights that must be restored to trigger the exception are the rights to vote, to hold public office, and to serve on a jury. *United States v. Caron*, 77 F.3d 1, 2 (1st Cir.) (*en banc*), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2569, 135 L.Ed.2d 1085 (1996).

This court has held that all three core civil rights must be restored for a person to avoid the prohibition of section 922(g). *United States v. Indelicato*, 97 F.3d 627, 631 & n. 3 (1st Cir.1996). In Massachusetts, a convicted felon does not lose the right to vote. Mass.Gen.L. ch. 54, §§ 86, 103B. And Estrella was no longer incarcerated in February 1994, so he could now hold public office. Mass.Gen.L. ch. 279, § 30. Nevertheless, the government argues that Estrella's right to serve on a jury had not been sufficiently restored when he purchased the pistol.

Massachusetts disqualifies from jury service any person who "has been convicted of a felony within the past seven years or is a defendant in pending felony case or is in the custody of a correctional institution." Mass.Gen.L. ch. 234A, § 4(7). Estrella's conviction in 1980 for the predicate offense, the armed assault and robbery, occurred more than seven years prior to his purchase of the gun in 1994. The government claims, however, that in 1994 Estrella was still "in the custody of a correctional institution" by dint of his continuing parole status.

The government cites federal decisions holding that parole constitutes "custody" for purposes such as federal habeas jurisdiction. *E.g., United States v. Flynn*, 49 F.3d 11, 14 (1st Cir.1995) (citing cases). But "custody" has been defined broadly in this context for reasons peculiar to habeas corpus, *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S.Ct. 1136, 1143-44, 79 L.Ed.2d 409 (1984); and under section 921(a)(20), state law governs whether Estrella is barred from serving on juries. *Beecham v. United States*, 511 U.S. 368, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994). We have not found any Massachusetts decisions that decide whether a parolee is barred from service.

While the term "custody" is elastic, it is doubtful that a paroled prisoner would normally be described as being in the custody "of a correctional institution." Further, the Supreme Judicial Court has referred in passing to section 4(7) as disqualifying prospective jurors on the grounds of "*incarceration* or conviction of a felony within the past seven years." *Commonwealth v. Tolentino*, 422 Mass. 515, 663 N.E.2d 846, 849 n. 3 (1996) (emphasis added). Massachusetts also has a statutory definition of "correctional institution," defining it in physical terms and referring to

its use "for the custody . . . of committed offenders and of such other persons as may be placed in custody therein. . . . " Mass.Gen.L. ch. 125, §§ 1(d), (e).

Despite these scraps of statute and precedent, some might think it odd that a felon still on parole should be seated on a jury. Still, circumstances vary, and the immediate issue is simply whether Massachusetts imposes an automatic ban. We think this is a matter that the state supreme court could probably decide either way, but – pending such clarification – our best assessment is that Massachusetts law does not automatically disqualify a parolee seven years after conviction.

As a fall-back argument, the government says that even if Estrella could in theory serve on a jury, Massachusetts law so curtails the opportunity for any ex-felon to serve as a juror that this civil right has not been sufficiently restored to satisfy section 921(a)(20). By statute, a Massachusetts trial judge can choose to remove from a jury panel a person convicted of any felony or other crime punishable by imprisonment of more than one year. Mass.Gen.L. ch. 234, § 8. In *Caron* we left open the problem now posed. 77 F.3d at 6.

We join other circuits in concluding that to meet the test of section 921(a)(20), each of the three core "civil rights" must be substantially, but not perfectly, restored.[1] In applying this test, we are guided by the rationale

[1] *E.g., United States v. Morrell*, 61 F.3d 279, 280 (4th Cir.1995); *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir.1990); *United States v. McKinley*, 23 F.3d 181, 183 (7th Cir.1994); *Presley v. United States*, 851 F.2d 1052, 1053 (8th Cir.1988).

behind Congress' use of "civil rights restored" as a touchstone: the notion that by reinvesting a person with core civic responsibilities, the state vouches for the trustworthiness of that person to possess firearms (unless that right is withheld). *Indelicato*, 97 F.3d at 630.

While regarding the matter as close, we think that the Massachusetts legislature has expressed the requisite, albeit unquantifiable, measure of confidence in ex-felons such as Estrella so far as concerns jury service. Our view rests not only on the language of section 8 but on what we take to be its philosophy. Almost a century ago, the Supreme Judicial Court said that:

> in this commonwealth it is not the law that persons convicted of crime shall be permanently deprived of their civil rights. Our legislation, more humane and charitable than the law of early times, recognizes the possibility of repentance and reformation. . . . [T]here is nothing to prevent the board from putting upon the jury list the name of a former criminal, if they find him to be of good moral character and otherwise suitable.

Commonwealth v. Wong Chung, 186 Mass. 231, 71 N.E. 292, 293 (1904).

The right of the trial judge to dismiss an ex-felon under section 8 appears to be a safeguard, allowing the trial judge to dismiss the ex-felon out of hand wherever his record, or the nature of the case, warrants that course; without this provision, a judge might have to give a particularized reason. Thus viewed, this qualification does not appear to detract from the *Wong Chung* view that in Massachusetts an ex-felon after seven years and

release from jail is presumptively trusted to serve on a jury. *Accord United States v. Caron*, 941 F.Supp. 238, 246 (D.Mass.1996).

Construing a somewhat similar state restriction, two circuits have held that Michigan does not restore the civil rights of felons. *United States v. Metzger*, 3 F.3d 756, 759 (4th Cir.1993), *cert. denied*, ___ U.S.___, 114 S.Ct. 1374, 128 L.Ed.2d 50 (1994); *United States v. Driscoll*, 970 F.2d 1472, 1478-79 (6th Cir.1992), *cert. denied*, 506 U.S. 1083, 113 S.Ct. 1056, 122 L.Ed.2d 362 (1993). But Michigan court rules require automatic exclusion of felons as jurors whenever a party so moves, and also direct courts to excuse convicted felons *sua sponte* from jury panels in criminal cases, once that ground for exclusion is established. *Metzger*, 3 F.3d at 759. Michigan law is thus more hostile to service by ex-felons than is the law of Massachusetts.

Although all three of Estrella's core civil rights were restored by Massachusetts, his prior felony conviction still counts as a predicate offense if Massachusetts "expressly provide[d]" that he "may not ship, transport, possess, or receive firearms," 18 U.S.C. § 921(a)(20), "firearm" being broadly defined to include *inter alia* handguns, shotguns and rifles. *Id.* § 921(a)(3). Estrella objects that his parole papers nowhere expressly provide that he could not own firearms; but his civil rights were not restored by pardon, or by his parole papers, but by state statutes. And in such a situation, we look to Massachusetts law as a whole for the "express" restrictions. *United States v. Sullivan*, 98 F.3d 686, 689 (1st Cir.1996).

Some might think it perverse to look to Massachusetts firearms law when the purchase was made in

New Hampshire. But the trigger for the *federal* ban is the Massachusetts conviction; and the ban is removed only if Massachusetts has shown the requisite confidence in the ex-felon by restoring civil rights without limiting firearms ownership. (New Hampshire, of course, is free to impose its own limitations on gun ownership within the state, but they do not control the federal ban one way or the other here.)

In Massachusetts, an ex-felon released from custody for more than five years can obtain a firearm identification card, Mass.Gen.L. ch. 140, § 129B, which permits one to possess a handgun (any firearm with a barrel of less than 16 inches, or a short-barrel shotgun) in his residence or place of business and to possess a rifle or long-barrel shotgun anywhere. *Id.* ch. 269, § 10(a). But in Massachusetts a convicted felon cannot carry a handgun anywhere else, *id.* ch. 140, §§ 125, 131, 131F; ch. 269, § 10(a); never can purchase, rent or lease a handgun, *id.* ch. 140, § 131A; and never can sell, rent or lease to another person any firearms, ch. 140, § 122.

In assessing this patchwork of restrictions, little help is provided by the federal statute's language – "may not ship, transport, possess, or receive firearms" – since this language does not tell us how much restriction is needed where some rights are permitted and others forbidden. The legislative history refers only to the "right to firearm ownership" as if it were indivisible. S.Rep. No. 583, 98th Cong., 2d Sess. 7 (1984). Possibly Congress never considered the case in which the ex-felon's right to own firearms was restricted in some ways but not others.

Four of the circuits that have construed section 921(a)(20) conclude that it does not protect the ex-felon if the state continues in any way to restrict significantly the ex-felon's right to "ship, transport, possess, or receive firearms." Under this "all or nothing" approach, it does not matter whether the particular weapon possessed by the defendant was permitted or forbidden by state law. The Sixth and Tenth Circuits so construe the "exception to the exception," and the Seventh and Eighth come to about the same result by treating firearms privileges as one of the civil rights that must be restored to trigger section 921(a)(20).[2]

By contrast, the Ninth Circuit makes the federal ban apply only if the ex-felon is found to possess a weapon that state law forbids to him. *United States v. Dahms*, 938 F.2d 131, 134-35 (9th Cir.1991); *see also United States v. Tomlinson*, 67 F.3d 508, 513 (4th Cir.1995); *but see United States v. Clark*, 993 F.2d 402, 404-05 (4th Cir.1993). Thus, if Estrella had bought a long-barreled shotgun, the federal ban would not here apply. This approach has patent virtues: it respects the state's own choice; it may provide better warning to the ex-felon *if* he remains in his state of conviction; and it is probably easier for courts to administer in the first instance (by asking what state law permits as to *this* weapon).

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[2] *Compare Driscoll*, 970 F.2d at 1480, and *United States v. Burns*, 934 F.2d 1157, 1160 (10th Cir.1991), *cert. denied*, 502 U.S. 1124, 112 S.Ct. 1246, 117 L.Ed.2d 478 (1992), *with United States v. Lee*, 72 F.3d 55, 57-58 (7th Cir.1995), and *United States v. Ellis*, 949 F.2d 952, 955 (8th Cir.1991).

But the Ninth Circuit's approach is less persuasive as a reading of the statute. It strains the literal language of the "unless" proviso, *see Driscoll*, 970 F.2d at 1480-81; and while the federal statute does in some measure defer to state law, it does not give *carte blanche* to the states. *Indelicato*, 97 F.3d at 629-30. We have overridden literal language where it appeared inadvertent and undermined Congress' aim. *Id.* But requiring that the state permit the untrammeled possession of firearms is fully consistent with the trustworthiness rationale that underpins the "civil rights restored" provision itself.

The Ninth Circuit approach might give some limited protection to a defendant who remains in the state of original conviction and who honestly relies on state law; but it is not clear that this is a common case, and (as we explain below) the statute does not require willfulness at all. As for ease of administration, Congress in drafting the statute certainly did not have this value high on its list, and the plurality approach of cases like *Driscoll* requires more work in the first case to assess the law of the state but less work in subsequent cases involving the same state.

Under the plurality approach, which we choose to follow, we think that Massachusetts' ban on handgun possession by ex-felons outside the home or business is a substantial enough limit on firearms rights to preserve the federal ban. Other courts have taken the same view in assessing other state statutes. *United States v. Wagner*, 976 F.2d 354, 356 (7th Cir.1992); *Driscoll*, 970 F.2d at 1481; *Burns*, 934 F.2d at 1160-61. In the future, there might be

close cases where, for example, some other state's restriction is arguably *de minimis;* but an ordinary Massachusetts felon will not be exempted from the federal ban.[3]

Estrella raises several other claims of error concerning his conviction and sentence. He argues first that he lacked the requisite scienter because he believed that his civil rights had been restored. But this panel is bound by the earlier ruling in this circuit that under section 922(g), "the government need not prove that the defendant knowingly violated the law; rather, it only need prove . . . that the defendant knowingly possessed firearms." *United States v. Smith,* 940 F.2d 710, 713 (1st Cir.1991). *Accord United States v. Capps,* 77 F.3d 350, 352-53 (10th Cir.), *cert. denied,* ___ U.S. ___, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996); *Tomlinson,* 67 F.3d at 513-14 n. 9 (distinguishing *Staples v. United States,* 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994)).

A risk of injustice exists wherever a legislature makes criminal conduct that some may believe to be lawful. But the federal felon-in-possession statute does not impose a statutory minimum term, 18 U.S.C. § 924(b), so long as the defendant is not a three-time violent felon, *id.* § 924(e)(1). Even if a jury can be found to convict, sentencing judges are not likely to deal harshly with the defendant in the rare case of a truly innocent-minded violation.

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[3] Recently, the Ninth Circuit held that Massachusetts law does not restore the civil rights of ex-felons at all. *United States v. Oman,* 91 F.3d 1320 (9th Cir.1996). The court's reasoning is different than ours, consistent in some respects and not in others, but its result for Massachusetts ex-felons is the same.

Estrella is not in this category. He was told when his parole supervision was transferred to New Hampshire that he could not possess firearms. Although his brief says that by February 1994 the New Hampshire parole rules had lapsed, it appears that New Hampshire state law independently prohibited Estrella from possessing the pistol and there is some indication that Estrella was so warned. Further, Estrella's outright lie on the ATF form, denying that he had ever been convicted for a crime punishable by at least one year in prison, is not the act of an innocent man.

Because a mistake of law was no defense, we need not discuss at length two other claims by Estrella: that the government should not have been allowed to introduce evidence of the New Hampshire parole rules and that defense counsel should have offered evidence that the rules had lapsed. Apparently, the government's evidence was offered without objection. It is enough that neither piece of evidence had much bearing upon the issues properly before the jury or was likely to alter the result.

Next, Estrella says that the search warrant did not authorize entry into his garage. The warrant approved by the district court permitted the search of the "residence of Lawrence R. Estrella, . . . more particularly described as a blue cape-style house with a breezeway connecting a two-car garage and located 450 feet uphill on Tiffany Hill Road. . . . " We agree with the district court that the common-sense meaning of the warrant was that the area to be searched included the garage. *Accord United States v. Bonner,* 808 F.2d 864, 868 (1st Cir.1986), *cert. denied,* 481 U.S. 1006, 107 S.Ct. 1632, 95 L.Ed.2d 205 (1987).

Finally, Estrella provides an outline, but little more, of several objections to his sentence. Although we could treat those arguments as abandoned, *see United States v. St. Cyr*, 977 F.2d 698, 701 (1st Cir.1992), the length of the mandatory sentence has led us to examine each argument on the merits, but none appears to have force. We see no reason to describe those outlined arguments, nor to advert further to several other claims of trial error that were amply developed in Estrella's brief but seem to us plainly hopeless.

Affirmed.

Supreme Court of the United States

No. 97-6270

Gerald R. Caron,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the First Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 23, 1998. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 25, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 10, 1998. Rule 29.2 does not apply.

January 9, 1998

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(6)

Supreme Court, U.S.
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No. 97-6270

In The

Supreme Court of the United States

October Term, 1997

GERALD R. CARON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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QUESTION PRESENTED

When (1) a person with a state felony conviction receives a pardon or has civil rights restored, (2) the pardon or state law reinstates some, but not all, of the person's firearms privileges, and (3) the person then possesses a permitted firearm and is prosecuted as a "felon in possession" under 18 U.S.C. § 922(g), is it the case that the "pardon . . . or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms" (18 U.S.C. § 921(a)(20)) and that the person therefore falls outside the pardon/civil-rights'-restoration exemption from the felon-in-possession law and the Armed Career Criminal Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTES 2

STATEMENT 3

SUMMARY OF ARGUMENT 10

ARGUMENT 11

I. THE "ALL OR NOTHING" READING OF THE "EXPRESSLY PROVIDES" CLAUSE OF THE 18 U.S.C. § 921(a)(20) PARDON/RIGHTS'-RESTORATION EXEMPTION IS CONTRARY TO THE PLAIN MEANING OF THE CLAUSE'S WORDS 11

II. THE "ALL OR NOTHING" READING IS INCOMPATIBLE WITH CONGRESS'S MAIN GOAL IN ADOPTING THE PARDON/RIGHTS'-RESTORATION EXEMPTION AND ITS OTHER 1986 AMENDMENTS TO 18 U.S.C. § 921(a)(20): DEFERENCE TO STATE INTERESTS 18

III. READING THE "EXPRESSLY PROVIDES" CLAUSE AS PERMITTING PARTIAL REINSTATEMENT OF FELONS' FIREARMS PRIVILEGES MAKES BETTER SENSE OF THE STATUTORY SCHEME 23

a. Avoiding Unfairness to the Felon who Relies Upon the Terms of a Pardon or Upon State Law 23

TABLE OF CONTENTS – Continued

Page

b. Avoiding the Irrationality of States' Having to Give Rights'-Restored Felons Access to the Most Dangerous Legal Firearms in Order to Allow Access to the Least Dangerous 25

c. Ease of Administration 26

d. The Invalidity of the Trustworthiness Rationale 27

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Beecham v. United States, 511 U.S. 368 (1994) 9

Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983) 19, 20

Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974) 20

United States v. Bass, 404 U.S. 336 (1971) 18, 22

United States v. Caron, 941 F.Supp. 238 (1996) 6, 7

United States v. Caron, 64 F.3d 713 (1st Cir. 1995) 1, 3, 5, 25

United States v. Caron, 77 F.3d 1 (1st Cir.) (en banc), *cert. denied*, 116 S.Ct. 2569 (1996) 1, 6

United States v. Cassidy, 899 F.2d 543 (6th Cir. 1990) 12, 19

United States v. Dahms, 938 F.2d 131 (9th Cir. 1991) 13, 30

United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992), *cert. denied*, 506 U.S. 1083 (1993) 13, 27, 28, 29

United States v. Estrella, 104 F.3d 3 (1st Cir. 1997), *cert. denied*, 117 S.Ct. 2494 (1997) ..... *passim*

United States v. Gradwell, 243 U.S. 476 (1917) 17

United States v. Granderson, 511 U.S. 39 (1994) 18

United States v. Indelicato, 97 F.3d 627 (1st Cir. 1996) 21, 28

United States v. Lacher, 134 U.S. 624 (1890) 17

United States v. McLean, 904 F.2d 216 (4th Cir.), *cert. denied*, 498 U.S. 875 (1990) 19

TABLE OF AUTHORITIES – Continued

Page

United States v. Qualls, 108 F.3d 1019, *order granting rehearing en banc*, 122 F.3d 38 (9th Cir. 1997) 13

United States v. Ramos, 961 F.2d 1003 (1st Cir.), *cert. denied*, 506 U.S. 934 (1992) 5, 6

United States v. Shoemaker, 2 F.3d 53 (4th Cir. 1993) 13

United States v. Sullivan, 98 F.3d 686 (1st Cir. 1996) 12

United States v. Wind, 986 F.2d 1248 (8th Cir. 1993) 13

STATUTES, SENTENCING GUIDELINES, AND RULE

18 U.S.C. § 921(a)(20) ..... *passim*

18 U.S.C. § 921(a)(20) (1985) 18-19

18 U.S.C. § 922(g) 2, 24

18 U.S.C. § 922(g) (1985) 20

18 U.S.C. § 922(g)(1) 4

18 U.S.C. § 922(h) (1985) 20

18 U.S.C. § 924(a)(2) 7

18 U.S.C. § 924(e) 4

18 U.S.C. § 924(e)(1) 3

18 U.S.C. App. § 1201-1203 (1985) 20, 21

28 U.S.C. § 1254(1) 1

Fed. R. Evid. 609(e) 30

Firearms Owners' Protection Act, Pub.L. No. 99-308, 100 Stat. 449 18

Mass. Gen. L. ch. 140, § 129B 7, 24

TABLE OF AUTHORITIES – Continued

Page

Mass. Gen. L. ch. 140, § 131 7

Mass. Gen. L. ch. 127, § 133 30

Mass. Gen. L. ch. 279, § 24 30

Sentencing Guidelines:

§ 4A1.2(e) 7

§ 4B1.4 5

§ 4B1.4(b)(3) 5

§ 4B1.4(c)(2) 5

§ 5A – Sentencing Table 5

MISCELLANEOUS

Civil Disabilities of Convicted Felons, A State-by-State Survey (Department of Justice loose-leaf book, October 1996) 30

Kathleen M. Olivares, Velmer S. Burton, Jr. & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60-SEP Fed. Probation 10 (1996) 29

H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, Benchmarks, 196 (1967) 18

S. 1030, 97th Cong., 1st Sess. (1981) 22

S.Rep. 476, 97th Cong., 2d Sess. (1982) 23

S.Rep. 583, 98th Cong., 2d Sess. (1984) 23

Sutherland Statutory Construction § 45.12 (5th ed. 1992) 26

OPINIONS BELOW

The Order of Court (May 9, 1997) of the court of appeals (J.A. 52-54) is unpublished. The opinion of the district court (J.A. 9-51) is reported at 941 F.Supp. 238. An opinion of the court of appeals in the same case on an earlier appeal is reported at 64 F.3d 713 (1st Cir. 1995) and an en banc opinion on that appeal is reported at 77 F.3d 1 (1st Cir. 1996).

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Judgment below was by way of the Order of Court of May 9, 1997. While petitioner's request for rehearing en banc was pending in the circuit court, Justice Souter on August 7, 1997 extended until October 6, 1997 the time for petitioner to file for certiorari. By order of August 11, 1997, the court of appeals denied en banc rehearing; the order also stated that petitioner's petition for rehearing was denied, though petitioner had filed no request for (panel) rehearing. The petition for certiorari was timely filed October 6, 1997 under Rule 29.2. In addition, the petition was timely filed because filed within 90 days of denial of rehearing, given that the court of appeals treated the request for en banc hearing as a request for rehearing. Rule 13.3. This Court granted certiorari and petitioner's motion to proceed *in forma pauperis* on January 9, 1998.

RELEVANT STATUTES

1. Section 921(a)(20) of Title 18 of the United States Code says:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include –
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. Section 922(g) of Title 18 of the United States Code says in pertinent part:

> It shall be unlawful for any person –
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year,
>
> . . .

> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. Section 924(e)(1) of Title 18 of the United States Code says:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT

On July 14, 1993, Fall River, Massachusetts police, responding to a telephone call, arrested petitioner, Gerald R. Caron (referred to here sometimes as "defendant"), on various state charges. At the time of his arrest, he was holding a loaded .22 caliber Ruger semiautomatic rifle. *United States v. Caron, supra*, 64 F.3d at 714. Some months later, on December 1, 1993, law enforcement agents executed a federal search warrant at defendant's home in the adjoining town of Westport, Massachusetts and seized four rifles, two shotguns, and over 6,800 rounds of

ammunition. *Id.* Defendant had a criminal record, some specifics of which are stated below.

On February 10, 1994, a grand jury in the District of Massachusetts charged defendant with violating – or, in the case of the first count, with conspiring to violate – 18 U.S.C. § 922(g)(1), the "felon in possession" law, quoted above. The indictment charged that defendant, having been convicted of (an unspecified) crime punishable by imprisonment for a term exceeding one year, possessed in or affecting commerce: on or about July 14, 1993 in Fall River the Ruger .22 rifle (Count Two) and .22 ammunition (Count Three) and on or about December 1, 1993 in Westport the two shotguns and four rifles (Count Four) and 6,823 rounds of ammunition (Count Five). J.A. 4-8. Count One, the conspiracy count, was dismissed before trial.

Defendant was convicted by a jury in a two-day trial in July 1994.

At sentencing on September 19, 1994, the district court, over defendant's objection, found that defendant had four prior convictions meeting the definition of "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). (The ACCA, quoted in part above, requires a minimum 15-year prison sentence for a "felon in possession" with three or more prior convictions for violent felony or serious drug offense.) The convictions in question were three old Massachusetts convictions for breaking and entering or attempted breaking and entering dating from 1958, 1959, and 1963 and a 1970 California conviction for assault with intent to murder and attempted murder. Presentence Report,

August 31, 1994, paras. 57, 59, 62, 73, 92, and p. 3 of the (September 15, 1994) Addendum to the Presentence Report. Defendant's objection was that the three Massachusetts convictions did not meet the definition of "crime punishable by imprisonment for a term exceeding one year" in that they fell within 18 U.S.C. § 921(a)(20)'s exemption for convictions for which a person has had civil rights restored. In rejecting defendant's contention, the district court followed *United States v. Ramos*, 961 F.2d 1003 (1st Cir.), *cert. denied*, 506 U.S. 934 (1992), which had held that the civil rights' restoration exception applies only when rights are restored on an individualized, case-by-case basis. (No such individualized restoration had taken place for defendant's convictions.)

The court then applied the ACCA sentencing guideline, U.S.S.G. § 4B1.4. It found that defendant's July 14, 1993 offenses (Counts Two and Three) were in connection with a crime of violence and, accordingly, arrived at an offense level of 34 and a Criminal History Category VI. *See* U.S.S.G. §§ 4B1.4(b)(3) and 4B1.4(c)(2) (raising, respectively, the usual ACCA offense level of 33 to 34 and the usual ACCA Criminal History Category of IV to VI if the firearm possession was in connection with a crime of violence). The guideline sentencing range for level 34, Category VI is 262-327 months (U.S.S.G. ch. 5, part A – Sentencing Table). The court sentenced defendant to the low point of the range, *i.e.*, to a prison sentence of 262 months (21 years, 10 months) together with a term of supervised release and a $200 special assessment.

Defendant's conviction and sentence were affirmed on appeal. *United States v. Caron*, 64 F.3d 713, *supra*. On

rehearing en banc, however, the court of appeals overruled its *Ramos* case and remanded the case for reconsideration of whether the rights'-restoration exemption applied to the three Massachusetts convictions. *United States v. Caron*, 77 F.3d 1, *supra*. Specifically, the district court was to consider whether Massachusetts had sufficiently restored defendant's civil right to sit on a jury and – the issue now before this Court – whether the exemption's "expressly provides" clause defeated defendant's argument that his civil rights had been restored. *Id.* at 6. (The court noted general agreement that "civil rights" under § 921(a)(20) comprise the rights to vote, to seek and hold public office, and to serve on a jury. *Id.* at 2. It found that, because Massachusetts never abrogates a felon's right to vote and because it restores upon release from imprisonment the right to seek and hold office, defendant's civil rights would be restored if his right to serve on a jury had been restored. *Id.* at 5-6.)

(This Court on June 24, 1996 denied certiorari with respect to other issues defendant had raised on appeal. 116 S.Ct. 2569.)

On remand, the district court, after hearings, ruled in a Memorandum and Order issued September 12, 1996 that (1) Massachusetts law restores to felons, seven years after conviction or release from imprisonment, the civil right to serve on a jury and that defendant's civil rights had thus been restored with respect to his three Massachusetts convictions and (2) that Massachusetts had not "expressly provide[d] that [defendant might] not ship, transport, possess, or receive firearms." J.A. 9-51; 941 F.Supp. 238. Accordingly, as defendant had only one remaining ACCA predicate – the 1970 assault/attempted-

murder conviction – the district court found him ineligible for ACCA sentencing.

In making its finding that the "expressly provides" clause did not apply to the three convictions, the district court explained that Massachusetts law reinstates, five years after conviction or release from any resulting sentence, a convicted felon's right to have rifles and (long-barreled) shotguns as well as to have handguns at one's residence or business. J.A. 31-41, 941 F.Supp. at 248-252. Mass. Gen. L. ch. 140, § 129B. The court noted that Massachusetts law prevents a convicted felon from ever receiving a license to carry handguns. J.A. 37, 941 F.Supp. at 250. Mass. Gen. L. ch. 140, § 131. As defendant's case involved rifles and shotguns, the court rejected the government's argument that the "expressly provides" clause was "all or nothing," *i.e.*, that the lifetime ban on defendant's carrying handguns made the rights'-restoration exemption altogether inapplicable. J.A. 44-47, 941 F.Supp. at 253-4.

Defendant was resentenced on October 15, 1996. The court found defendant's offense level to be 20, his Criminal History Category to be II, and his guideline sentencing range to be 37-46 months. (The Criminal History Category was only II because the Sentencing Guidelines, unlike the ACCA, set cut-off dates for counting convictions, *see* U.S.S.G. § 4A1.2(e), and defendant's only conviction recent enough to count was a federal conviction on which he was released in 1981. Presentence Report, para. 76.) Over defendant's objection, the district court departed upwards to the 10 year maximum prison sentence for ordinary, non-ACCA felon-in-possession offenses. *See* 18 U.S.C. § 924(a)(2). Accordingly, defendant

was sentenced to 10 years' imprisonment, a term of supervised release, and a special assessment.

Both parties appealed. The government appealed from the district court's finding that defendant's three breaking and entering convictions were, by reason of civil rights' restoration, exempt from the ACCA consideration (No. 96-2339). Defendant appealed from the court's upward departure (No. 96-2338).

While the appeal was still in early stage, the First Circuit decided *United States v. Estrella*, 104 F.3d 3 (January 9, 1997), *cert. denied*, 117 S.Ct. 2494 (1997), a case that decided both civil-rights'-restoration issues on which the district court had ruled in this, Caron's, case. (Because the circuit court's later decision in this case was controlled by *Estrella*, the parties have agreed to include *Estrella* in the Joint Appendix. J.A. 57-70.)

At issue in *Estrella*, a felon-in-possession case from the District of New Hampshire, was a Massachusetts conviction on which Estrella had been released from prison more than seven years before the federal offense. Estrella made the same argument as Caron: that his prior conviction was not a "crime punishable by imprisonment for a term exceeding one year" because Massachusetts had restored his civil rights. In *Estrella*, the circuit court first held that Massachusetts had restored Estrella's civil rights. In particular, it decided the main open question on whether Massachusetts restores § 921(a)(20) civil rights, holding – in agreement with the district court in Caron's case – that the right to serve on a jury is restored seven years after release from any imprisonment imposed on a conviction. J.A. 60-64, 104 F.3d at 6-7. (Even though

Estrella lived in New Hampshire and the firearm was found in his garage, § 921(a)(20) civil-rights'-restoration takes place, if at all, only in the jurisdiction that imposed the conviction. *Beecham v. United States*, 511 U.S. 368 (1994).) But, *Estrella* then held, in *disagreement* with the district court in Caron's case, that though Massachusetts felons in time become eligible to have rifles and shotguns – and even, in limited circumstances, handguns – Massachusetts, in forever barring felons from carrying handguns, had "expressly provide[d] that [Estrella might] not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20).

Relying on *Estrella*, the circuit court on May 9, 1997 issued the order that disposed of Caron's appeal and as to which this Court has now granted certiorari. J.A. 52-54. The order vacated the district court's judgment, ordered defendant resentenced under the ACCA, and dismissed as moot defendant's appeal of the district court's upward departure. J.A. 54. In particular, the order said:

> After the district court resentenced Caron, this court decided *United States v. Estrella*, 104 F.3d 3 (1st Cir. 1997). In *Estrella*, we adopted an "all or nothing" approach under which a conviction counts within the meaning of § 920(a)(20) if the state continues in any way to restrict significantly the ex-felon's right to ship, transport, possess, or receive firearms. *Estrella*, 104 F.3d at 8. We also held that "Massachusetts' ban on handgun possession by ex-felons outside the home or business is a substantial enough limit on firearms rights to preserve the federal ban." *Id.*

J.A. 53.

As already stated, defendant's request for en banc hearing was in due course denied (Norman H. Stahl, J., dissenting) and this Court granted certiorari on January 9, 1998.

SUMMARY OF ARGUMENT

The exemption in 18 U.S.C. § 921(a)(20) from the reach of federal firearms law for convictions as to which there has been pardon, civil rights' restoration, expungement, or set-aside does not become inapplicable if the pardon or state law allows access to only some, and not all, firearms, for these reasons:

If a person receives a pardon or a restoration of rights that allows possession of some firearms but not others, it cannot, as a matter of simple English, be said that the pardon or restoration of rights provides that the person may not possess firearms. To say that a person may not have firearms is to say that the person may not have *any* firearms; it is not, as proponents of the "all or nothing" view apparently claim, to say that there are firearms that the person may not have. The rule of lenity, moreover, requires that the "all or nothing" view be rejected if the words of the statute are unclear on the issue.

The "all or nothing" reading is incompatible with Congress's main goal in enacting the pardon/civil-rights'-restoration exemption and other changes to the preexisting 18 U.S.C § 921(a)(20): to defer to state interests.

Reading the § 921(a)(20) exemption to honor partial reinstatement of firearms privileges makes the most sense. It avoids the unfairness to a pardoned or rights'-restored felon who innocently relies on the pardon or state law and possesses a firearm that the pardon or state law allows him to possess. It avoids the irrationality of a state's being able to give felons access to the least dangerous firearms only if it gives them access to the most dangerous. It avoids the administrative problem of having federal courts find and evaluate state law restricting firearms not in issue in the case. The "trustworthiness" rationale, the policy ground cited by cases adopting "all or nothing" to support their reading, is fatally flawed because the § 921(a)(20) exemption applies in a host of situations where a person with a felony conviction has not been deemed fully 'trustworthy.'

ARGUMENT

I. THE "ALL OR NOTHING" READING OF THE "EXPRESSLY PROVIDES" CLAUSE OF THE 18 U.S.C. § 921(a)(20) PARDON/RIGHTS'-RESTORATION EXEMPTION IS CONTRARY TO THE PLAIN MEANING OF THE CLAUSE'S WORDS

The phrase at issue here is the "expressly provides" clause in the third (and last) sentence of 18 U.S.C. § 921(a)(20). That sentence, again, is:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or

> restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

The issue in the case is whether, despite rights'-restoration and despite expiration of the five-year Massachusetts ban on felons' access to long-barreled guns, Caron's three Massachusetts convictions in question count as § 921(a)(20) convictions on the ground that Massachusetts, in imposing its ban on felons' carrying handguns, "expressly provides that [felons] may not ship, transport, possess, or receive firearms," *i.e.*, whether the "all or nothing" view of the clause is correct.

(For brevity, we refer in what follows to the "pardon/rights'-restoration exemption" as shorthand for the entire exemption, including expungements and set-asides, and at times refer to the "expressly provide" clause's prohibition on possession as shorthand for the full "ship, transport, possess, or receive" prohibition. We take it as a given that where civil rights are restored by operation of state law, rather than in a case-specific document, one looks to the whole of state law – not just the particular statutes that restore civil rights – to determine whether there is an express provision that the person may not possess firearms. *See United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990); *See also United States v. Sullivan*, 98 F.3d 686, 689 (1st Cir. 1996) (listing cases on the latter point.))

To say that a felony conviction as to which a felon has had rights restored does not count under the felon-in-possession law unless it is provided that he may not possess firearms is to say that the conviction does not count unless it is provided that he may not possess *all*

firearms. A proviso that a person may have specified types of firearms but not others is *not* a proviso that he may not have firearms.

To read, as some of the cases do,[1] the plain language of the statute as requiring the "all or nothing" view is to read the phrase "provides that the person may not . . . possess firearms" in an abnormal manner. If a homeless shelter were funded under a grant that required it to prohibit alcohol on the premises, adopting a house rule prohibiting hard liquor but allowing beer and wine would unquestionably violate the grant's terms. In normal parlance, a rule that prohibits some, but not all, alcohol is not a rule that prohibits alcohol.

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[1] The cases on the clause's meaning cover a wide range. Some say that the "all or nothing" reading is required by the plain language of § 921(a)(20). *United States v. Driscoll*, 970 F.2d 1472, 1481 (6th Cir. 1992), *cert. denied*, 506 U.S. 1083 (1993). Some say that the clause is ambiguous and apply the rule of lenity in the defendant's favor. *United States v. Dahms*, 938 F.2d 131 (9th Cir. 1991). One case, though it initially speaks of "ambiguity" in the statute, then takes it for granted, without resort to the rule of lenity, that a restoration of rights not prohibiting firearms possession at home did not "expressly provide that the [defendant might] not ship, transport, possess, or receive firearms" when the possession occurred in the defendant's home. *United States v. Shoemaker*, 2 F.3d 53 (4th Cir. 1993) ('ambiguity' being mentioned at 55). Another case assumes – and holds – without discussion that the rights'-restoration exemption applies if state law allows the firearm possession at issue but prevents access to some other firearms that non-felons may possess. *United States v. Wind*, 986 F.2d 1248 (8th Cir. 1993). The issue in this case was recently reheard by the Ninth Circuit. *United States v. Qualls*, 108 F.3d 1019, *order granting rehearing en banc*, 122 F.3d 38 (9th Cir. 1997) (reargued Nov. 20, 1997).

In the cases we have found on the issue, the claim for a conviction's exemption from federal firearms law has rested on restoration of civil rights. The invalidity of the "all or nothing" reading becomes even clearer if one considers the case of a pardon.

Assume that a person with an old felony conviction has since lived an exemplary life and would now like to go hunting. He presents the governor's pardon office with his grounds for pardon, and he explains that he hopes to regain rifle and shotgun privileges but that he has no interest in ever possessing handguns. (Suppose state law, absent a pardon, never allows a felon to have firearms of any type.) The governor, herself a believer in strict limits on handguns, deems a pardon appropriate. She grants a pardon that lets the person have *some* guns but not others; the pardon specifies that he "shall have full privileges with respect to *rifles* and *shotguns* but no *handgun* privileges." If the person now goes hunting with a rifle or shotgun affecting commerce, can he be prosecuted as a felon in possession?

Clearly not. As a matter of plain English, it is simply incorrect to say that the "pardon . . . expressly provides that the person may not ship, transport, possess, or receive firearms." If the person, after reading the statute, asked himself whether his pardon prohibited his possessing firearms, he would say, correctly, that it prohibited his having *some* firearms but that it certainly did not prohibit his having *firearms*. It is, we submit, *intuitively clear* to any English speaker that the pardon does not expressly provide that the person may not ship, transport, possess, or receive firearms. In short, the plain meaning of the statute's words, the meaning that the man or woman in the

street would take from them, flatly contradicts the "all or nothing" view.

The cases that derive the "all or nothing" meaning from the statute's plain language apparently assume that the literal meaning of the sentence "X may not . . . possess . . . firearms" is "There are firearms that X may not . . . possess. . . . " But as speakers of English, we know that the two sentences mean something quite different, just as we know that "Smoking is prohibited in federal buildings" is worlds apart from "Smoking is prohibited in some federal buildings." Because after Caron's civil rights were restored Massachusetts law provided that Caron was allowed to possess rifles and shotguns, it simply did not "expressly provide that he might not possess firearms."

The government might say that the words with which the pardon/rights'-restoration exemption begin – "Any conviction" – suggest that a given conviction either does or does not count for felon-in-possession/ACCA purposes and is not divisible according to what type of firearm the felon possesses and under what circumstances. A conviction, it may say, either *is* a "crime punishable by imprisonment for a term exceeding one year" or it is *not*; and something cannot jump from being a conviction to not being a conviction depending upon whether the convicted person at such and such a time and place is carrying, say, a pistol as opposed to a rifle.

This argument is invalid. Because the exemption is phrased in terms of when an *actual* conviction is to be *considered* a conviction for certain purposes, the exemption is premised on the notion that whether or not a

conviction counts for those purposes depends on the circumstances. Indeed, even proponents of the "all or nothing" reading have to concede that whether a conviction counts under § 921(a)(20) is circumstance-dependent. Suppose that a state restores civil rights upon release from custody and removes all firearms restrictions two years later. If the person was on parole for *four* years and is returned to custody in year 3 for parole violation, the original conviction, for a period of time not a "conviction" as defined in § 921(a)(20), returns to being a § 921(a)(20) conviction upon return to custody and until two years after the second release.

To make its rejection of "all or nothing" view even clearer, Congress *could* have said that convictions for which there has been expungement, a set-aside, pardon or rights-restoration do not count "*except to the extent that* the pardon, expungement, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms." By contrast, had it wanted to adopt the "all or nothing" view, Congress could have said that convictions for which there has been expungement, a set-aside, pardon or rights-restoration do not count "unless the pardon, expungement, or restoration of rights places any express limits on the person's firearms privileges." In fact, had it chosen "all or nothing," Congress could have worded the whole exemption more simply by saying something like:

> Any conviction which, without express limits on firearms privileges, has been expunged or set aside or for which a person has, without such limits, been pardoned or had civil rights restored shall not be considered a conviction for purposes of this chapter.

The government may argue that a completely literal reading of the exemption produces an absurd result. Inasmuch as the hypothetical pardon, in banning some but not all firearms, does not "expressly provide that the person may not . . . possess . . . firearms," the government may say that the literal meaning of the exemption is that the prior conviction "shall not be considered a conviction" even if the felon-in-possession case involves a *banned* firearm.

This argument is, in essence, a debater's point that lacks substance. As a matter of common sense, no one who juxtaposed such a case against the exemption's language would read it that way. The hypothetical pardoned person could not buy a handgun and then, when acting in direct defiance of the terms of the pardon, say with a straight face that he was exempt from the felon-in-possession law. What the argument tells us, if anything, is that Congress might have been more precise had it said, as suggested above, that convictions do not count as such except to the *extent* that the pardon or rights'-restoration bans firearms.

Insofar as the statute is thought to be unclear, "all or nothing" cannot prevail in any event. "[B]efore a man can be punished under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917), quoting *United States v. Lacher*, 134 U.S. 624, 628 (1890). As the Court said recently, the rule of lenity should be

applied where a criminal law's "text, structure, and history" "fail to establish that the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994). The rule embodies "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 209 (1967), quoted in *United States v. Bass*, 404 U.S. 336, 348 (1971). If anything is certain here, it is that a pardon that allows a person rifles and shotguns but not handguns neither 'plainly and unmistakably' nor 'expressly' provides that he may not possess firearms.

II. THE "ALL OR NOTHING" READING IS INCOMPATIBLE WITH CONGRESS'S MAIN GOAL IN ADOPTING THE PARDON/RIGHTS'-RESTORATION EXEMPTION AND ITS OTHER 1986 AMENDMENTS TO 18 U.S.C. § 921(a)(20): DEFERENCE TO STATE INTERESTS

The theme behind the changes Congress made to § 921(a)(20) when the pardon/rights'-restoration exemption was added to it was a desire to defer to state interests, a theme that "all or nothing" would undercut.

The pardon/rights-restoration exemption became law in 1986 as part of "FOPA," the Firearms Owners' Protection Act. Pub.L. No. 99-308, 100 Stat. 449.

Before FOPA's enactment, 18 U.S.C. § 921(a)(20) said:

> The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

(1985).

No study of legislative history is needed to discern Congress's primary goal in changing 921(a)(20): to defer substantially to state interests. *See, e.g., United States v. McLean*, 904 F.2d 216, 218 (4th Cir.), *cert. denied*, 498 U.S. 875 (1990) ("Congress intended 'deference to state law with respect to the federal firearms privileges of persons convicted in that state.' " (quoting *Cassidy*, 899 F.2d at 549)). The main changes FOPA made to § 921(a)(20) make Congress's goal clear.

1. FOPA added the sentence "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held," which overruled a decision of this Court that "[w]hether one has been 'convicted' within the language of the gun control statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the state." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111-112 (1983). In deferring to state definitions of 'conviction,' Congress concluded that state interests should prevail over this Court's warning that "a rule that would give effect to expunctions under varying state

statutes would seriously hamper effective enforcement . . . " and that "perplexing problems would confront those required to enforce federal gun control laws . . . " 460 U.S. at 121, 122. (The case involved an Iowa state "deferred judgment" that had been expunged.)

2. Subject to the "expressly provides" clause, FOPA gave states the power to exempt expunged, set-aside, and rights'-restored convictions from the reach of federal firearms law.

3. As for pardons, it confirmed states' ability to exempt pardoned individuals from the felon-in-possession law and shifted an important burden that had operated against exemptions. Before FOPA consolidated federal firearms' law in Title 18, both Title 18 and an Appendix to Title 18 had provisions restricting felons' access to firearms (*see* 18 U.S.C. §§ 922(g) and 922(h) (1985) and 18 U.S.C. App. § 1201-1203 (1985)), but only the provisions in the Appendix had a pardon exemption. 18 U.S.C. App. § 1203 (1985). At least one case had held that Title 18's failure to include a pardon provision made inoperable a provision in a pardon attempting to exempt the conviction from the felon-in-possession laws. *Thrall v. Wolfe*, 503 F.2d 313 (7th Cir. 1974). Moreover, the new § 921(a)(20), by presuming that a pardon exempted a conviction from counting under federal firearms law unless it expressly provided otherwise, reversed the contrary presumption in pre-FOPA law, which read:

> This title shall not apply to – . . . (2) any person who has been pardoned by the President of the United States or the chief executive of a State and has *expressly* been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

18 U.S.C. App. § 1203 (1985) (emphasis added).

4. FOPA deleted from clause (A) of § 921(a)(20), "as the Secretary may by regulation designate," thus taking away some additional power, albeit limited, from the federal government.

Thus the overall theme of FOPA's amendments to § 921(a)(20) is clear. Congress decided to accede in major respects to state interests, experience, and judgment in specifying to what extent criminal convictions were countable for purposes of federal law. In saying that the exemption should be read in a way that gives no respect to state pardons, rights'-restorations, and expungements that draw thoughtful lines between some firearms and others, the "all or nothing" reading is in outright conflict with this objective.

True, Congress did not revamp the felon-in-possession law to such an extent that it perfectly *mirrored* state law on what firearms a felon could possess, and where and when. Thus, *United States v. Indelicato*, 97 F.3d 627, 629-630 (1st Cir. 1996) (cited in the *Estrella* case, J.A. 67, 104 F.3d at 8, for this point) notes that "if a state does not restore a felon's civil rights but expressly allows him to possess firearms, the felon may still be prosecuted under the federal statute." *Indelicato*, 97 F.3d at 629-30. That Congress made pardon and rights'-restoration touchstones for states' exempting felons from the felon-in-possession law, however, in no way even *suggests* that the "expressly provides" clause means that a felon who is

pardoned or has rights restored must be given access to all guns or else none at all.

This Court has said that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971) (itself a case on federal firearms law). The main clause of the pardon/rights'-restoration exemption *cedes* power to the states – or, more precisely, it suspends the operation of federal law enforcement within part of an area, namely the area of firearms, that is subject to both federal and state enforcement. The "all or nothing" reading conflicts with the rule in *Bass* in that it views Congress, without clearly stating its purpose, as intending the "expressly provides" clause to give some enforcement power back to the federal government, thus altering the federal-state balance established by the exemption's main clause.

Legislative history that we have found on the "expressly provides" clause, though it does not consider the "all or nothing" question, clearly indicates how Congress would have answered the question. Explaining changes the Committee made to a FOPA precursor (S. 1030, 97th Cong., 1st Sess. (1981)) as originally introduced, a Senate Judiciary Committee Report says:

> The original language of S. 1030 provided that a person barred from gun ownership by a conviction would be relieved from that bar if he received a pardon or restoration of civil rights. The amended bill adds the exception that this will not apply if the pardon or restoration expressly provides that the recipient may not own firearms This allows *flexibility* should such a pardon or restoration be based upon considerations not relating to fitness to own a firearm.

S.Rep. 476, 97th Cong., 2d Sess. 12 (1982). In addition, an explanation of the changes to § 921(a)(20) in a later Senate Judiciary Committee Report includes this sentence:

> In the event that the official granting the pardon, restoration of rights, or expungement of record does not intend that it restore the right to firearm ownership, this provision honors that intent as expressly provided in the order or pardon.

S.Rep. 583, 98th Cong., 2d Sess. 7 (1984). The Committee's use of the word "flexibility" and the phrase "honor that intent" shows the desire to *accommodate* state interests, not to override them.

III. READING THE "EXPRESSLY PROVIDES" CLAUSE AS PERMITTING PARTIAL REINSTATEMENT OF FELONS' FIREARMS PRIVILEGES MAKES BETTER SENSE OF THE STATUTORY SCHEME

a. Avoiding Unfairness to the Felon who Relies Upon the Terms of a Pardon or Upon State Law

The "all or nothing" view, if correct, increases the chance of serious injustice occurring when a state permits felons, after pardon or rights'-restoration, to have some guns but not others. If a felon acquires a firearm in reliance upon a pardon or state law allowing him to have it, it would be grossly unfair to prosecute him as a felon in possession because the pardon or state law prevents him from having other firearms.

The *Estrella* case itself says that one of the "patent virtues" of the non-"all or nothing" view is that "it may provide better warning to the ex-felon *if* he remains in his state of conviction[.]" J.A. 66, 104 F.3d at 8 (emphasis in original). But *Estrella* then qualifies this statement, saying (1) that it is not clear that it is common for a defendant to remain in the state of original conviction and to honestly rely on state law and (2) that, in any event, the felon-in-possession statute does not require willfulness. J.A. 67, 104 F.3d at 8.

Moving to another state would rarely alleviate any notice problem, however. In the case of a pardon, the "all or nothing" reading could create a notice problem even if the person moved to another state. In the case of rights'-restoration, the notice problem created by the "all or nothing" reading would remain if the person, as a result of rights'-restoration in the state of conviction, was allowed some but not all firearms and then moved to another state where felons are permitted to possess (a) some of the same guns as permitted by the state of conviction or (b) all guns that non-felons may have.

Nor does the absence of a statutory willfulness element in § 922(g) bear on the policy issue. Compared with the usual ignorance-of-the-law situation, the risk of injustice is of a higher order when a state specifically legalizes conduct – and sometimes, as in Massachusetts, even grants a physical license to the person to engage in the conduct – that the federal government, unbeknownst to the person, forbids. *See* Mass. Gen. L. ch. 140, § 129B (allowing a felon not otherwise ineligible to receive the state license to possess and carry rifles and shotguns five years after conviction or release). Caron, in fact, had such

a license. *Caron*, 64 F.3d at 714. The "all or nothing" view, in fostering the opportunity for an innocent-minded felon to get trapped, decidedly undermines the statutory goal of "Firearms Owners' Protection."

(This is not to say that the view of the "expressly provides" clause allowing partial reinstatement of firearms privileges solves *all* notice problems. A Massachusetts felon who, soon after five years had elapsed after release from prison, obtained a rifle relying on a valid Massachusetts rifle/shotgun license, could be prosecuted federally because his civil right to serve on a jury is not restored until seven years after release.)

b. Avoiding the Irrationality of States' Having to Give Rights'-Restored Felons Access to the Most Dangerous Legal Firearms in Order to Allow Access to the Least Dangerous

A consequence of the "all or nothing" reading is that if a state wants at some point to allow felons to be able to have the least dangerous firearms, it must give them access to the most dangerous firearms that non-felons have access to. That result makes no sense. Rather, state authorities should be allowed to balance the important interests at stake: reinstatement of some felons' firearms rights vs. the public safety.

In balancing those interests, states have come up with different solutions, based on topography, population, traditions, and the like, including, possibly, actual experience with felons' access to firearms of varying types. But if "all or nothing" is correct, states that restore civil rights and wish to allow some felons to hunt or to

protect herds from predators must, against their possible better judgment, change their laws to make sure that those felons may have access to "Saturday night specials" if the states' non-felons do.

"It has long been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Sutherland Statutory Construction* § 45.12 (5th ed. 1992). For this reason alone, "all or nothing" should be rejected.

c. Ease of Administration

Estrella concedes that, as opposed to "all or nothing," the reading of the "expressly provides" clause that allows limited reinstatement of firearms privileges "is probably easier for courts to administer in the first instance (by asking what state law permits as to *this* weapon)." J.A. 66, 104 F.3d at 8 (emphasis in original). But *Estrella* later says:

> As for ease of administration, Congress in drafting the statute certainly did not have this value high on its list, and the ["all or nothing" approach] requires more work in the first case to assess the law of the state but less work in subsequent cases involving the same state.

J.A. 67, 104 F.3d at 8.

As *Estrella* suggests, deciding whether a state's law that allows the firearm at issue in a felon-in-possession case prohibits other firearms may involve a fair amount of work. One reason for this is that, as *Estrella* concedes,

there may be close cases where a state's restriction on felons' access to firearms is "arguably *de minimis*." *Id.* The federal court may thus not only have to *search* for state law limiting access to firearms not in issue in the case before it but, more important, *evaluate* whether or not such a limitation, if found, is substantial or merely *de minimis*. On the other hand, under the view permitting partial reinstatement of firearms privileges, a federal district court need, in cases where civil rights have been restored and state law arguably allows the possession of the firearm at issue in the felon-in-possession case, only concern itself with what state law actually says.

d. The Invalidity of the Trustworthiness Rationale

Although both the Sixth Circuit's *Driscoll* case and the *Estrella* case base their adoption of the "all or nothing" reading on their view of § 921(a)(20)'s literal meaning, they also put forward a policy argument in favor of the "all or nothing" reading. Thus, *Estrella* says:

> But requiring that the state permit the untrammeled possession of firearms is fully consistent with the trustworthiness rationale that underpins the "civil rights restored" provision itself.

J.A. 67; 104 F.3d at 8. *Driscoll* makes the same point. It says that if a state chooses to treat former felons "as full members of society, and refuses to place any limitations on their activities" and thus has "effectively vouched for its convicted felons, declaring them to be free of stigma,"

> Congress, in turn, has promised to respect the states' decisions, and has decided not to burden those whom the states have exonerated. Because

> of this interpretation of federal law, we reject the idea . . . that federal law prohibits convicted felons only from carrying such weapons as the state [sic] originally sentenced them would not allow them to carry. Under federal law, a person is either treated as a convicted felon, and thus prohibited from carrying any firearms, or is treated as though he had a clean record, and thus allowed to carry all legal firearms.

970 F.2d at 1480. *Estrella* and *Driscoll* say, in other words: (1) because the rights'-restoration exemption does not mirror state law as to whether the felon may have firearms, given that the state must first deem him a *trustworthy* person, by dint of pardon, rights'-restoration, etc., and (2) because a state has not found a person fully trustworthy if there are guns that non-felons may have but that he may not, then (3) allowing the felon to have some types of guns violates the law's rationale unless the felon is trustworthy enough to have all guns that non-felons may have.

(In an earlier case on the rights'-restoration clause, *United States v. Indelicato*, 97 F.3d 627 (1996), the First Circuit viewed trustworthiness as a less-than-perfect explanation of Congressional intent. "This 'trustworthiness' rationale is about the best that we or anyone else has managed to explain Congress's approach." *Id.* at 630.)

If *Driscoll* and *Estrella* are correct that Congress, in adopting the pardon/rights'-restoration exemption, wanted felons to have access to firearms only when the state had "refused to place any limitations on their activities" and "declared them to be free of stigma," then

Congress did a poor job of saying so. Were that Congress's goal, it could have said something like: "Any conviction because of which, by reason of pardon or otherwise, a person is not deemed by law any less trustworthy than otherwise shall not be considered a conviction for purposes of this chapter" – and in doing so have spared the world the hundreds of cases that the clause has engendered, including the present series of cases on the meaning of the "expressly provides" clause. 'Trustworthiness' might have been a rationale for another statute that another Congress wrote at another time, but it has no relation to the statute Congress in fact wrote.

In appealing to trustworthiness, *Estrella* and *Driscoll* overlook a key fact: that complete trustworthiness is *not* a precondition for exempting felons from the felon-in-possession law.

Restrictions on felons necessarily fall into three classes: restrictions on civil rights, *i.e.*, voting, public office, jury service; firearms' restrictions; and *other* restrictions, such as restrictions on employment. *Estrella* and *Driscoll* fail to consider that § 921(a)(20)'s rights'-restoration exemption applies to a felon who (1) has had the three civil rights restored, (2) is permitted access to all firearms by state law, but (3) is subject to other restrictions, perhaps severe, due to the past felony – restrictions that show he or she is not "free of stigma" and not a "full member of society." For example, a felony conviction may be an impediment to certain types of employment, is grounds in some states for divorce, may in some be a factor in terminating parental rights, and may, for certain offenses, require registration under sex-offender registration laws. *See, generally,* Kathleen M. Olivares, Velmer S.

Burton, Jr. & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60-SEP Fed. Probation 10 (1996). *See also Civil Disabilities of Convicted Felons, A State-by-State Survey* (Department of Justice loose-leaf book, October 1996). Convictions may, if within prescribed time limits, make credibility subject to impeachment in court proceedings. (In states following Fed. R. Evid. 609(e), even a pardon does not necessarily exempt one from impeachment.) Indeed, in at least one state, Michigan, one's civil rights are evidently restored when one leaves prison, even if one is on *parole*. *See United States v. Dahms*, 938 F.2d at 131, 132-133. Likewise, in Massachusetts one can be on parole for many years after the seven years required for rights'-restoration. *See* Mass. Gen. L. ch. 279, § 24 and ch. 127, § 133.

In sum, Congress is comfortable with allowing rights'-restored felons, even if still under severe restrictions, access to all firearms. It is irrational, then, to think that Congress would be *un*comfortable with allowing felons – ones perhaps no longer under other restrictions – to have only certain kinds of firearms on the ground that the state deems them insufficiently trustworthy to have all firearms available to non-felons.

The "trustworthiness rationale," moreover, suffers from circularity. Suppose Congress *had* wanted states, before a pardon or state law could exempt felons from the felon-in-possession law, to have first declared them fully trustworthy in all other areas. If the governor or state law had made such a declaration by eliminating all non-

firearms stigma and then, in deciding upon firearms privileges, decided not to allow the felon every lawful firearm, the governor or state would be in a Catch-22 situation were Congress to say that preventing access to some lawful firearms shows that the governor or state has thereby found him untrustworthy after all.

For each of these reasons, trustworthiness fails as a policy rationale to justify the "all or nothing" reading.

CONCLUSION

Petitioner requests that the judgment of the court of appeals in its case No. 96-2339 be reversed and that the judgment of the district court be affirmed in finding him not eligible for sentencing under the Armed Career Criminal Act. Petitioner requests that the order of the court of appeals in its case No. 96-2338 dismissing his appeal of the district court's upward departure be vacated and that the appeal be reinstated.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

GERALD R. CARON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the partial firearms disability that state law imposes on petitioner as a result of his prior state felony convictions means that those convictions continue to count for purposes of the federal firearms restrictions and enhanced sentencing provisions of 18 U.S.C. 922(g) and 924(e)(1), notwithstanding the restoration of petitioner's civil rights within the meaning of 18 U.S.C. 921(a)(20).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	5
Summary of argument	11
Argument:	
A prior conviction remains a "conviction" for purposes of the federal firearms laws so long as the convicting jurisdiction imposes significant restrictions on the defendant's possession of firearms	13
A. The relevant statutory language requires an "all-or-nothing" approach	13
B. Nothing in the history or purpose of the relevant provisions would justify a different construction	21
C. Petitioner's policy arguments are unpersuasive	24
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Beecham v. *United States*, 511 U.S. 368 (1994)	14, 17, 22, 25, 28
Custis v. *United States*, 511 U.S. 485 (1994)	6
Dickerson v. *New Banner Institute*, 460 U.S. 103 (1983)	22
King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991)	17
McGrath v. *United States*, 60 F.3d 1005 (2d Cir. 1995)	27
Oncale v. *Sundowner Offshore Servs., Inc.*, No. 96-568 (Mar. 4, 1998)	21

Cases—Continued: Page

Taylor v. *United States*, 495 U.S. 575 (1990) 21
United States v. *Burns*, 934 F.2d 1157 (10th Cir. 1991), cert. denied, 502 U.S. 1124 (1992) 15
United States v. *Caron*:
77 F.3d 1 (1st Cir.), cert. denied, 116 S. Ct. 2569 (1996) 5, 7, 8, 9, 14, 22
64 F.3d 713 (1st Cir. 1995) 5, 7, 8
615 F.2d 920 (1st Cir. 1980) 7
United States v. *Cassidy*, 899 F.2d 543 (6th Cir. 1990) 14
United States v. *Dahms*, 938 F.2d 131 (9th Cir. 1991) 15, 26
United States v. *Driscoll*, 970 F.2d 1472 (6th Cir. 1992), cert. denied, 506 U.S. 1083 (1993) 13, 15, 19-20, 27, 28
United States v. *Ellis*, 949 F.2d 952 (8th Cir. 1991) 15
United States v. *Estrella*, 104 F.3d 3 (1st Cir.), cert. denied, 117 S. Ct. 2494 (1997) 10
United States v. *Hall*, 20 F.3d 1066 (10th Cir. 1994) 14
United States v. *Indelicato*, 97 F.3d 627 (1st Cir. 1996), cert. denied, 117 S. Ct. 1013 (1997) 14, 25, 27
United States v. *Lee*, 72 F.3d 55 (7th Cir. 1995) . 15, 20, 27
United States v. *Meeks*, 987 F.2d 575 (9th Cir.), cert. denied, 510 U.S. 919 (1993) 27
United States v. *Palazzi*, 115 F.3d 906 (11th Cir. 1997) 15
United States v. *Qualls*, 108 F.3d 1019, reh'g en banc granted, 122 F.3d 38 (9th Cir. 1997) 15
United States v. *Thomas*, 991 F.2d 206 (5th Cir.), cert. denied, 510 U.S. 1014 (1993) 25
United States v. *Tomlinson*, 67 F.3d 508 (4th Cir. 1995) 15

Cases—Continued: Page

United States v. *Wind*, 986 F.2d 1248 (8th Cir. 1993) 15
United States v. *Woodall*, 120 F.3d 880 (8th Cir. 1997) 25

Statutes:

Armed Career Criminal Act, 18 U.S.C. 924 *et seq.*:
18 U.S.C. 924(e) 4, 5, 9, 11, 17, 20, 24
18 U.S.C. 924(e)(1) 4, 6, 8, 19
18 U.S.C. 921(a)(3) 2, 6, 7, 16, 19
18 U.S.C. 921(a)(16) 7
18 U.S.C. 921(a)(20) ..... *passim*
18 U.S.C. 922(g) 3, 5, 17, 20, 24
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Miscellaneous:

131 Cong. Rec. (1985):
p. 16,984 23
p. 16,987 23
S. Rep. No. 476, 97th Cong., 2d Sess. (1982) 23, 24
S. Rep. No. 583, 98th Cong., 2d Sess. (1984) 22, 23, 24

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OPINIONS BELOW

The order of the court of appeals (J.A. 52-54) is unreported. That court's opinion in *United States* v. *Estrella* (J.A. 57-70), on which it relied in deciding this case, is reported at 104 F.3d 3. Earlier opinions addressing different issues in this case are reported at 77 F.3d 1 (en banc) and 64 F.3d 713. The opinion of the district court (J.A. 9-51) is reported at 941 F. Supp. 238.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1997. On August 7, 1997, Justice Souter extended the time within which to file a petition for a

writ of certiorari to and including October 6, 1997. A suggestion for rehearing en banc, which the court of appeals treated as including a petition for rehearing, was denied on August 11, 1997. J.A. 55-56. The petition for a writ of certiorari was placed on the docket on October 8, 1997, and granted on January 9, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 921 of Title 18 provides in pertinent part as follows:

§ 921. Definitions

(a) As used in this chapter [18 U.S.C. 921-930]—

* * * * *

(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device [as defined in Section 921(a)(4)]. Such term does not include an antique firearm.

* * * * *

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or

other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. Section 922 of Title 18 provides in pertinent part as follows:

§ 922. Unlawful Acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped

or transported in interstate or foreign commerce.

3. Section 924 of Title 18 provides in pertinent part as follows:

§ 924. Penalties

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year * * * that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious

potential risk of physical injury to another[.]

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on four counts of possessing a firearm or ammunition after having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g). He was sentenced to 262 months' imprisonment under the enhanced sentencing provisions of 18 U.S.C. 924(e). A panel of the court of appeals affirmed, *United States* v. *Caron* (*Caron I*), 64 F.3d 713 (1st Cir. 1995), but the full court ordered en banc rehearing of a sentencing issue and ultimately remanded for resentencing. *United States* v. *Caron* (*Caron II*), 77 F.3d 1 (1st Cir.) (en banc), cert. denied, 116 S. Ct. 2569 (1996). On remand, the district court concluded that Section 924(e) did not apply, but it departed upward from the range otherwise applicable under the Sentencing Guidelines and imposed a sentence of 120 months' imprisonment, to be followed by three years of supervised release and accompanied by a special assessment of $200. In the judgment presently under review, the court of appeals reversed the district court's holding that Section 924(e) did not apply, and again remanded for resentencing.

1. Federal law prohibits any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" from possessing "any firearm" in or affecting commerce. 18 U.S.C. 922(g)(1). The term "firearm" is defined broadly to include "any weapon * * * which will or is designed to or may readily be converted to expel a

projectile by the action of an explosive." 18 U.S.C. 921(a)(3). The Armed Career Criminal Act, 18 U.S.C. 924(e)(1), requires a mandatory minimum sentence of 15 years' imprisonment for any person convicted under Section 922(g)(1) who has "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." For purposes of both Section 922(g)(1) and Section 924(e)(1) (at least as to violent felonies, see *Custis* v. *United States*, 511 U.S. 485, 491 (1994)), Section 921(a)(20) provides that:

> What constitutes a conviction * * * shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction * * *, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. At approximately 10:30 p.m. on the evening of July 14, 1993, petitioner, who was drunk, walked into the home of two acquaintances, Walter and Sally Miller, carrying a .22-caliber semi-automatic rifle loaded with a multiple-shot ammunition clip. Gov't C.A. App. 173, 177, 185, 188, 347, 351.[1] After brandishing the rifle, speaking abusively, specifically threatening Walter Miller, his daughter, and his three-year-

[1] "Gov't C.A. App." refers to the appendix filed by the government in connection with the original appellate proceedings (First Circuit No. 94-2026), which contains the bulk of the trial transcript, the transcript of the initial sentencing proceedings, and other record material.

old grandson, and demanding the repayment of money that he had lent the Millers, petitioner followed Sally Miller to the kitchen, where she offered him money from her purse. *Id.* at 347-348, 351-352. Petitioner eventually followed Miller to the rear porch of the house, where police officers who had responded to a call concerning the incident disarmed and arrested him. *Id.* at 172, 348-349, 352. The officers seized the rifle and 185 rounds of ammunition. J.A. 9 n.1.

Investigation by agents of the federal Bureau of Alcohol, Tobacco, and Firearms (BATF) revealed that petitioner had an extensive criminal record. Gov't C.A. App. 366. In addition to Massachusetts felony convictions for breaking and entering at night in 1958, 1959, and 1963, petitioner had been convicted of assault with intent to murder and attempted murder in California in 1970, and of federal firearms charges arising from the sale of a sawed-off shotgun to an undercover agent in 1977. *Ibid.*; J.A. 10 n.3; Pet. Br. 4; *Caron II*, 77 F.3d at 2; *Caron I*, 64 F.3d at 714 & n.1; *United States* v. *Caron*, 615 F.2d 920, 920 (1st Cir. 1980).

In September 1993, a BATF special agent called on petitioner at home to see if petitioner had additional firearms that his criminal record made it unlawful for him to possess. Gov't C.A. App. 363. Petitioner replied that he had only flintlock or other antique "black powder" weapons (which are generally exempt from federal firearms prohibitions, see 18 U.S.C. 921(a)(3) and (16)), and that he owned no "conventional" firearms. Gov't C.A. App. 240-241, 363. The agent advised petitioner that federal law barred him from possessing firearms because of his prior federal conviction, and that "state law [did not] supersede federal law" in that respect. *Id.* at 241. In December

1993, agents executed a search warrant at petitioner's house and seized six rifles and shotguns and 6,823 rounds of ammunition. *Id.* at 241-243; J.A. 9 n.1.

3. A federal jury found petitioner guilty of four counts of possessing a firearm or ammunition after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1). The district court then found that petitioner was subject to the enhanced sentencing provisions of Section 924(e)(1), because petitioner's three Massachusetts convictions for breaking and entering and his California conviction for assault and attempted murder all qualified as violent felony convictions. See J.A. 9-10; *Caron II*, 77 F.3d at 2.

Petitioner argued that his Massachusetts convictions should not be counted for enhancement purposes because his civil rights had been restored, with respect to those convictions, within the meaning of Section 921(a)(20). The district court rejected that argument on the ground that, under First Circuit precedent, a defendant's civil rights could not be restored for federal firearms purposes without some individualized action by state officials with regard to a particular defendant. Gov't C.A. App. 333-334. The court therefore sentenced petitioner as an armed career offender. *Ibid.*; see J.A. 9-10.

The court of appeals initially affirmed both petitioner's convictions and his sentence. *Caron I*, *supra*. The court granted a limited en banc rehearing, however, to consider two sentencing issues, including whether a defendant's civil rights may be restored, for purposes of Section 921(a)(20), by laws of general application, as well as by individualized state action. See *Caron II*, 77 F.3d at 1-2. Reversing its

previous position, the court held that no individualized consideration is required. *Id.* at 2. Because the district court's application of Section 924(e) had been based on the court of appeals' prior interpretation, the court vacated petitioner's sentence and remanded the case. *Id.* at 6. The court directed the district court to apply Section 921(a)(20) by determining whether petitioner's civil rights (in particular, his right to sit on a jury) had been "restored" under Massachusetts law, and, if so, whether the State had nonetheless "expressly provide[d]" that petitioner was not to carry firearms. *Ibid.*; see J.A. 11-12.

4. On remand, the district court held that petitioner's right to serve on juries had indeed been restored. J.A. 13-26. The court further held that Massachusetts law did not "expressly provide[]" that petitioner could not carry firearms, within the meaning of Section 921(a)(20). The court explained that Massachusetts permitted petitioner, if he obtained an appropriate identification card (which he had done), to possess firearms at his home or place of business and to carry rifles or shotguns on his person or in his car. J.A. 26-41. The court acknowledged that Massachusetts continued to bar petitioner from carrying a handgun on his person or in a car (J.A. 35-40), but it considered that fact irrelevant in a case in which petitioner was charged with possessing rifles and shotguns. The court therefore concluded that petitioner could not be given an enhanced sentence under the Armed Career Criminal Act. J.A. 41.[2] In impos-

[2] Because petitioner's civil rights had not been restored with respect to his federal convictions, the district court concluded that the status of petitioner's Massachusetts (or California) convictions affected only the application of Section 924(e)'s en-

ing a new sentence, however, the court departed upward from the Sentencing Guidelines range applicable to non-career offenders, and it sentenced petitioner to ten years' imprisonment. See J.A. 53; 10/15/96 Tr. 22-28.

5. In the decision presently under review, the court of appeals reversed. J.A. 52-54. The court relied on its intervening decision in *United States* v. *Estrella*, 104 F.3d 3 (1st Cir.), cert. denied, 117 S. Ct. 2494 (1997), reprinted at J.A. 57-70, which had "adopted an 'all or nothing' approach under which a conviction counts within the meaning of § 92[1](a)(20) if the state continues in any way to restrict significantly the ex-felon's right to ship, transport, possess, or receive firearms." J.A. 53. *Estrella* had further held that Massachusetts' ban on possession of handguns by felons outside their homes or businesses is a sufficiently substantial restriction on the possession of firearms to preserve the federal ban in its entirety. *Ibid.*[3] Rejecting petitioner's argument that his possession of a state firearms identification card distinguished him from the "ordinary Massachusetts felon" whose situation it had considered in *Estrella*, the

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hanced sentencing provisions, not the validity of his present conviction under Section 922(g)(1). J.A. 47-51. The court's discussion of the question presented in this case (J.A. 44-47) did not affect its conclusion concerning the validity of petitioner's conviction. See J.A. 47.

[3] The decision in *Estrella* explained that in Massachusetts, a felon who has been out of custody for more than five years may obtain a permit to possess a handgun in his residence or place of business, and to possess a rifle or long-barrel shotgun in any place. J.A. 65. No felon may, however, carry a handgun outside his home or business; purchase, rent, or lease a handgun; or sell, rent, or lease any firearm to another person. *Ibid.*

court once again vacated petitioner's sentence and remanded the case for resentencing. J.A. 53-54.

SUMMARY OF ARGUMENT

The "exemption" clause of 18 U.S.C. 921(a)(20) provides generally that a state "conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction" for purposes of the federal firearms prohibition in Section 922(g)(1) or the sentence enhancement provisions of Section 924(e). The exemption clause is subject, however, to a qualification: "unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." The court of appeals correctly held that, by reason of the "unless" clause, a state conviction "counts" under Section 921(a)(20) so long as the convicting State continues to impose restrictions on a felon's state firearms privileges.

The language of Section 921(a)(20) compels an "all-or-nothing" approach to that question. The condition expressed in the "unless" clause is met if a State continues to limit a felon's firearms privileges, on the basis of his state conviction, in any one of several listed ways (*i.e.*, shipping, transporting, possessing *or* receiving firearms). Moreover, because federal law defines the term "firearm" to mean "any" gun, silencer, or destructive device, the "unless" clause applies if a restoration of rights provides that the felon may not possess "any" such item. That construction could yield either of two "all-or-nothing" meanings: That the clause applies if the State imposes continuing restrictions applicable to "any" item that is a federal "firearm," or that it does *not* apply if there is

"any" such item that the State *does* permit the felon to possess. As petitioner concedes, however, only the first of those two meanings is plausible in the context of the statute as a whole.

Petitioner seeks to split the difference between these two possible readings, contending that a state felon who has had his rights restored has a "conviction" for federal purposes only "to the extent" that the State of conviction continues to restrict his firearms privileges. That approach does not comport with the statutory language. Nothing in the relevant provisions addressing what constitutes a prior "conviction" authorizes differentiation on the basis of the particular type of firearm involved in the present offense. That is especially clear where, as here, prior state convictions are used, not as the predicate for prosecution of the present federal firearms offense, but to determine eligibility for a sentence enhancement based on recidivism.

Petitioner argues that the "all-or-nothing" construction of the "unless" clause is inconsistent with the "main goal" or "theme" of the amendments that enacted it. The short answer to that contention is that the construction petitioner proposes is inconsistent with the language that Congress actually enacted. In any event, petitioner's general observations concerning the relevant statutory history provide no compelling support for his position on the issue in this case. Similarly, petitioner's policy arguments based on notice to felons concerning federal firearms restrictions, on ease of administration, and on the overall reasonableness of the statutory scheme are both misdirected and unpersuasive.

The policy justification for the all-or-nothing rule that Congress enacted is found in the fact that the

federal scheme begins with the presumption that a convicted felon should not and may not, as a matter of federal law, possess firearms. Section 921(a)(20) creates a limited exception to that principle where a State has chosen to treat one of its own convictions as having no continuing effect on the felon's general civil rights *and* no effect on his privilege to possess firearms in the same manner as other citizens of the State. Only in that limited situation, however, has Congress "promised to respect the states' decisions, and * * * not to burden those whom the states have exonerated." *United States* v. *Driscoll*, 970 F.2d 1472, 1480 (6th Cir. 1992), cert. denied, 506 U.S. 1083 (1993). There is nothing irrational about that "fairly straightforward federal plan." *Id.* at 1481.

ARGUMENT

A PRIOR CONVICTION REMAINS A "CONVICTION" FOR PURPOSES OF THE FEDERAL FIREARMS LAWS SO LONG AS THE CONVICTING JURISDICTION IMPOSES SIGNIFICANT RESTRICTIONS ON THE DEFENDANT'S POSSESSION OF FIREARMS

A. The Relevant Statutory Language Requires An "All-Or-Nothing" Approach

Section 921(a)(20) of Title 18 governs whether a prior state criminal adjudication counts as a prior "conviction" for purposes of the federal firearms laws. The Section's "choice-of-law" clause provides generally that "[w]hat constitutes a conviction * * * shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. 921(a)(20). The "exemption" clause then provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned

or has had civil rights restored shall *not* be considered a conviction." *Ibid.* (emphasis added). In *Beecham* v. *United States*, 511 U.S. 368 (1994), this Court held that the jurisdiction that rendered a conviction is the only jurisdiction that can expunge it or set it aside, or pardon or restore the civil rights of the convicted individual, for purposes of the exemption clause. 511 U.S. at 371. The exemption clause itself is, however, subject to a further qualification, not discussed in *Beecham*, that may be called the "unless" clause: "unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

In construing these provisions, the courts of appeals have generally concluded that a felon "has had civil rights restored" (by far the most common ground for invoking the exemption clause) if the convicting jurisdiction has restored his rights to vote, to seek and hold public office, and to sit on juries.[4] They have also agreed that, in applying both the exemption clause and the "unless" clause, a court should generally look to the whole law of the convicting jurisdiction, which defines the continuing effect of the conviction.[5] The lower courts have divided, however, over how the "unless" clause applies if the convicting jurisdiction, having restored a

[4] See, *e.g.*, *Caron II*, 77 F.3d at 2; *United States* v. *Indelicato*, 97 F.3d 627, 630-631 & n.3 (1st Cir. 1996), cert. denied, 117 S. Ct. 1013 (1997); *United States* v. *Cassidy*, 899 F.2d 543, 545-550 (6th Cir. 1990).

[5] See, *e.g.*, J.A. 64; *Caron II*, 77 F.3d at 2 & n.1 (citing cases); *United States* v. *Hall*, 20 F.3d 1066, 1069 (10th Cir. 1994); *Cassidy*, 899 F.2d at 549; see generally *Beecham*, 511 U.S. at 370-373.

felon's core civil rights, also permits him to enjoy some, but not all, of the firearms privileges it accords to non-felons. The court of appeals correctly resolved that question by holding that a state conviction "counts" under Section 921(a)(20) so long as the convicting State "continues in any way to restrict significantly the ex-felon's right to ship, transport, possess, or receive firearms." J.A. 53; see J.A. 64-68.[6]

1. The court of appeals' conclusion follows from the relevant statutory text. The "unless" clause provides that a state conviction for which the defendant "has had civil rights restored shall not be considered a conviction * * *, unless such * * * restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." The enumeration of various possible restrictions,

[6] Although different courts of appeals have relied on somewhat different rationales (see J.A. 66 & n.2), that conclusion is the majority view. See *United States* v. *Lee*, 72 F.3d 55, 57-58 (7th Cir. 1995); *United States* v. *Driscoll*, 970 F.2d 1472, 1480-1481 (6th Cir. 1992), cert. denied, 506 U.S. 1083 (1993); see also *United States* v. *Palazzi*, 115 F.3d 906, 908 (11th Cir. 1997); *United States* v. *Ellis*, 949 F.2d 952, 954-955 (8th Cir. 1991); cf. *United States* v. *Burns*, 934 F.2d 1157, 1160-1161 (10th Cir. 1991) (relying on state law prohibiting only possession of short-barrelled guns), cert. denied, 502 U.S. 1124 (1992). The Fourth and Ninth Circuits have held, to the contrary, that the "unless" clause applies only if a state felon whose civil rights have otherwise been restored continues to be subject to a state firearms disability that applies to the specific type of firearm involved in the federal offense. See *United States* v. *Qualls*, 108 F.3d 1019, 1023-1024, reh'g en banc granted, 122 F.3d 38 (9th Cir. 1997) (reargued Nov. 20, 1997); *United States* v. *Tomlinson*, 67 F.3d 508, 513 & n.8 (4th Cir. 1995); *United States* v. *Dahms*, 938 F.2d 131, 134-135 (9th Cir. 1991); see also *United States* v. *Wind*, 986 F.2d 1248, 1252 (8th Cir. 1993) (Magill & Hansen, JJ., concurring specially).

listed in the alternative, immediately suggests that the condition expressed in the "unless" clause is met if the State continues to limit a felon's firearms privileges in any of the listed ways. By parallel construction, the condition is met if the State imposes such limitations with respect to any "firearms."

That conclusion is reinforced by the fact that the statutory term "firearm" is defined in Section 921(a)(3) to mean "any weapon * * * which will or is designed to * * * expel a projectile by the action of an explosive," the frame of such a weapon, or "any" silencer or "destructive device." Thus, application of the "unless" clause depends on whether a State continues to give effect to its prior conviction, despite a subsequent pardon or restoration of civil rights, by prohibiting the felon from possessing "any" gun or other item that is a "firearm" within the broad federal statutory definition. If the State prohibits its felons, as felons, from possessing "any" such item, then the condition in the "unless" clause is satisfied, and the felon's state conviction continues to be "considered a conviction" under Section 921(a)(20).

It is grammatically possible to read the "unless" clause to say instead that its condition is not satisfied (so that a conviction does not count for federal purposes) if there is "any" federal "firearm" that the State *does* permit its felons to possess. The latter construction is implausible, however, because it would mean that any state authorization for a felon to possess any firearm, no matter how trivial the privilege in comparison to other continuing state firearms disabilities, would have the effect of completely vitiating the federal firearms prohibition, both in that

State and elsewhere.[7] Even petitioner decries that result as "absurd." Pet. Br. 17. The only alternative that is consistent with the statutory language is the all-or-nothing construction adopted by the court below.

2. The court's construction is also consistent with the overall structure of the interlocking statutory provisions at issue. See generally *Beecham*, 511 U.S. at 372 ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences."); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context"). Section 922(g) imposes a criminal prohibition, and Section 924(e) provides for sentence enhancement, based in part on the existence of one or more prior convictions. In recognition that such convictions may arise from a variety of jurisdictions, Section 921(a)(20) defers to each jurisdiction's own judgments as to what "constitutes a conviction" in the first place, and as to certain actions the jurisdiction itself may take to eliminate entirely any continuing effect of one of its convictions. *Beecham*, 511 U.S. at 372-373. That deference is limited, however, by the "unless" clause. Under that clause, a conviction continues to count for federal firearms purposes if the convicting jurisdic-

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[7] Similarly, the enumeration of possible restrictions—"may not ship, transport, possess, *or* receive firearms"—could be read grammatically to require that a State expressly forbid each of those activities in order to satisfy the "unless" clause. The more natural reading, however, is that the State's continued imposition of any one of the listed restrictions is sufficient. Parallel reasoning supports the conclusion that continued state restriction of one type of "firearms" is sufficient to trigger the "unless" clause.

tion, however else it may have recognized the rehabilitation of its felons, has declined to restore to them the firearms privileges that it accords to other citizens. Under those circumstances, the federal prohibition remains in full force.

As petitioner observes (Br. 14), the same analysis applies under the "unless" clause whether the state action at issue is restoration of general civil rights or any of the other actions specified in Section 921(a)(20), such as a pardon. Thus, a state pardon that authorized a felon to possess rifles and shotguns, but left intact a state bar on his possession of handguns (see Pet. Br. 14), would trigger application of the "unless" clause (so that the state conviction would continue to count for federal purposes) just as surely as a state statute embodying the same continuing restriction. That result does not, however, demonstrate the "invalidity" (*ibid.*) of the statutory interpretation we propose. It demonstrates only that, in accommodating state and federal interests in this area, Congress has chosen to disregard a prior state conviction only if the rendering State itself gives the conviction no continuing effect for purposes of, among other things, imposing firearms disabilities.

3. Petitioner seeks to split the difference between the two possible readings of the statutory language that we have identified. He contends (Br. 11-18) that a felon who has been pardoned or whose civil rights have been restored has a "conviction" under Section 921(a)(20) only "to the extent" that the State of conviction continues to restrict his access to firearms. Thus, he argues, his prior Massachusetts convictions should not be considered "convictions" under Section 921(a)(20), for purposes of this case, so long as his possession of the guns involved in the present offense

was permissible as a matter of Massachusetts law. As the court of appeals acknowledged in *Estrella* (J.A. 66), that approach would "respect[] the state's own choice[s]" with regard to all aspects of the firearms privileges to be accorded its felons. As the court also concluded (J.A. 67), however, it does not comport with the statutory language.

As we have discussed, Section 921(a)(20) defines what is a "conviction" cognizable under Section 922(g)(1) and Section 924(e)(1). Once the existence of such a "conviction" is established, Section 922(g)(1) prohibits the convict from possessing "any firearm," as that term is comprehensively defined by Section 921(a)(3); and Section 924(e)(1) requires enhanced sentences if the defendant "has three previous convictions * * * for a violent felony or a serious drug offense." Although Section 921(a)(20) refers to state law for what "constitutes a conviction," for subsequent state actions that remove any continuing effects of the conviction, and for the existence of continuing state limitations on "firearms" privileges, nothing in any of the relevant provisions authorizes differentiation on the basis of the particular *type* of firearm involved in any step of the analysis. To the contrary, as the Sixth Circuit explained in *United States* v. *Driscoll*,

> [u]nder federal law, a person is either treated as a convicted felon, and thus prohibited from carrying any firearms, or is treated as though he had a clean record, and thus allowed to carry all legal firearms. Certainly, state law is important, for Congress has decided that convicted felons in one state may be treated differently than convicted felons in another state. But the idea that Con-

> gress intended to treat various weapons differently within the same state simply contradicts the plain language of federal law.

970 F.2d 1472, 1480-1481 (1992), cert. denied, 506 U.S. 1083 (1993); see *United States* v. *Lee*, 72 F.3d 55, 57 (7th Cir. 1995).

The point is especially clear in cases, like this one, in which prior state convictions are used to enhance a defendant's sentence under Section 924(e), rather than to support his underlying conviction under Section 922(g). In a prosecution, the question is generally whether the defendant was federally prohibited, by virtue of a prior state conviction, from possessing the particular firearms with which he was found. In that context, it might have been plausible for Congress to distinguish (had it decided to do so) between guns the State itself would have let its felons possess and those that it would not. Where, however, as here (see note 2, *supra*), the issue is one of enhanced sentencing for recidivist violent felons, it is difficult to see why it should matter whether the State or States that rendered the *prior* convictions would have prohibited the defendant from possessing the particular type of firearm involved in the *present* offense.[8] Because Congress provided a single statutory inquiry for use in both prosecution and sentencing, it is

[8] For example, if petitioner had been arrested for possessing a pistol and a rifle and charged with two counts of violating Section 922(g)(1), he could have been validly convicted on both counts because of his prior federal felony conviction. It would be odd if he were then subject to a mandatory minimum under Section 924(e) on only one of the two counts, on the ground his three prior Massachusetts violent felony convictions were "convictions" for purposes of the pistol count but not for purposes of the rifle count.

reasonable to conclude that Congress intended the reading of the statute that makes more sense in both contexts: A prior conviction remains a "conviction," for federal firearms purposes, if the State that rendered it continues to use it as a basis for imposing an ongoing firearms disability.[9]

B. Nothing In The History Or Purpose Of The Relevant Provisions Would Justify A Different Construction

Petitioner argues (Br. 18-23) that the "all-or-nothing" construction of Section 921(a)(20) is "incompatible" with the "main goal" or "theme" of the amendments that enacted the present statutory language. The short answer to that contention is that the construction petitioner proposes is incompatible with the language of the relevant statutes, and "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, No. 96-568 (Mar. 4, 1998), slip op. 4. In any event, petitioner's general observations concerning the relevant statutory history provide no compelling support for his position on the issue in this case.

[9] Petitioner's ultimate reliance on the rule of lenity (Br. 17-18) is misplaced. As we have explained, the statutory language provides no basis for petitioner's ad hoc construction of Section 921(a)(20). Any ambiguity in the statutory text is only between the two possible all-or-nothing rules we have identified: That the unless clause applies if the convicting State restricts a felon's possession of any firearm, as we argue, or that it does not apply if the State allows the felon to possess any firearm. Lenity does not require adoption of the latter construction because, as petitioner concedes (Br. 17), it is implausible as an interpretation of the statute taken as a whole. The rule of lenity "cannot dictate an implausible interpretation of a statute." *Taylor* v. *United States*, 495 U.S. 575, 596 (1990).

It is true, for example, that Congress's 1986 amendments to Section 921(a)(20) were, in part, a response to rulings such as this Court's decision in *Dickerson* v. *New Banner Institute*, 460 U.S. 103 (1983), which held that federal law rather than state law applied to determine what constituted a prior "conviction" for purposes of the federal firearms laws. See, *e.g.*, *Beecham*, 511 U.S. at 374; S. Rep. No. 583, 98th Cong., 2d Sess. 7 & n.16 (1984). One goal of those amendments was "to defer substantially to state interests." Pet. Br. 19. That observation begs the question, however, of how substantially, and in what particular respects, Congress intended to defer. None of the statutory changes petitioner highlights (Br. 19-21) sheds any light on the specific statutory question at issue in this case. As petitioner tellingly concedes (Br. 21), Congress did *not* simply rewrite federal law to conform it to the various firearms prohibitions imposed by the States on their own felons. Petitioner cannot persuasively argue, based only on the general notion that Congress intended to accommodate state interests, that this Court should now rewrite the language Congress enacted, in order to reach a goal that would have been easily attained had Congress desired it.

As to the legislative history of the 1986 amendments, there is considerable force to the court of appeals' observation, in the context of the different issue considered in the first en banc decision in this case, that the history "is more conflicting than the [statutory] text is ambiguous." *Caron II*, 77 F.3d at 4. In discussing a predecessor to the bill finally enacted, the Senate Judiciary Committee expressed a general intention to "to provide support to Federal, State, and local law enforcement officials in their fight against

crime and violence," while avoiding "any undue or unnecessary Federal restrictions or burdens on *law-abiding* citizens with respect to the acquisition, possession, or use of firearms" in connection with any "lawful activity." S. Rep. No. 583, *supra*, at 1-2 (emphasis added); see also *id.* at 3; S. Rep. No. 476, 97th Cong., 2d Sess. 1-2 (1982); 131 Cong. Rec. 16,984 (1985) (statement of Sen. Hatch) (bill would "redirect[] Federal firearm enforcement toward criminal violators."). In discussing what became the choice-of-law clause, moreover, the Committee explained that the design of the statute was that the law of the convicting jurisdiction would determine whether the conviction would be given continuing effect, and thus whether the defendant would be subject to the federal firearms disability. See S. Rep. No. 583, *supra*, at 7; S. Rep. No. 476, *supra*, at 18.[10]

The brief passages from the relevant reports that address the exemption and "unless" clauses do not, however, address the specific question presented by this case, and they certainly do not "clearly indicate[]" (Pet. Br. 22-23) how Congress would have resolved it. See S. Rep. No. 583, *supra*, at 7; S. Rep.

[10] These passages include statements that, taken out of context, could appear to support petitioner's argument in this case. See, *e.g.*, S. Rep. No. 583, *supra*, at 7 ("Since the Federal prohibition is keyed to the state's conviction, state law should govern in these matters."); see also 131 Cong. Rec. 16,987 (1985) (statement of Sen. Hatch) (bill "grants authority to the jurisdiction (State) which prosecuted the individual to determine eligibility for firearm possession after a felony conviction or plea of guilty to a felony."). Petitioner prudently forgoes reliance on these passages (see Br. 22-23), because context makes clear that they refer to a State's ability, under the choice-of-law clause, to define what state adjudications are to be considered "convictions."

No. 476, *supra*, at 12, 18. They merely emphasize that Congress was concerned with giving state officials the "flexibility" to grant a pardon or expungement, or to provide for the restoration of rights, with respect to a state conviction, *without* thereby automatically removing the felon's federal firearms disability under the new scheme that Congress was enacting. The "unless" clause in Section 921(a)(20) accomplishes that result.

C. Petitioner's Policy Arguments Are Unpersuasive

Finally, petitioner advances several policy arguments to support his construction of the "unless" clause. Pet. Br. 23-31. As we have demonstrated, this case is resolved by the language of the relevant statutes; arguments concerning their wisdom would be best directed to Congress. Even if it were permissible to rewrite the statute on policy grounds, however, none of petitioner's arguments is persuasive.

1. Petitioner contends (Br. 23-25) that it would be "grossly unfair" to prosecute a felon under Section 922(g) (or, presumably, to enhance his sentence under Section 924(e) on the basis of prior convictions) if he acquired a particular firearm in reliance on state law. Normally, however, we expect citizens to know and observe their obligations under both federal and state law, even though the two commonly differ in small or large respects.

Moreover, as the *Estrella* court observed (J.A. 67), any protection afforded by petitioner's approach would be largely confined to defendants who commit state offenses in only one State, and remain in that State when they later obtain and possess firearms that might be the subject of federal prosecution or sentence enhancement. As suggested by the facts in this case and in *Beecham*, 511 U.S. at 370, that is not necessarily a typical scenario. In this case, for example, federal law barred petitioner from possessing firearms because of his prior federal conviction (and possibly because of his conviction in California), whatever guns Massachusetts may have permitted him to possess. See J.A. 47-51.

Petitioner accurately observes (Br. 24) that some felons might move to States whose laws allowed them to possess guns that were also authorized by the State of their conviction. He does not, however, explain why that possibility provides a sound basis for interpreting federal law. Nor does he suggest any reason that a felon sufficiently alert and conscientious to comply with state firearms law—whether that of the State of conviction, another State, or both—should not be equally capable of ascertaining and complying with federal firearms requirements. Finally, as petitioner acknowledges (Br. 25), construing Section 921(a)(20) as he suggests would do nothing to prevent mistaken reliance on state firearms rules by felons whose civil rights to vote, hold office or sit on a jury have not been restored. See, *e.g.*, *United States* v. *Woodall*, 120 F.3d 880, 881 (8th Cir. 1997) (restoration of "[t]he isolated right to possess firearms, in the absence of restoration of * * * core civil rights as well, does not immunize convicted felons" under Section 921(a)(20)); *United States* v. *Indelicato*, 97 F.3d 627, 629-630 (1st Cir. 1996), cert. denied, 117 S. Ct. 1013 (1997); *United States* v. *Thomas*, 991 F.2d 206, 214-215 (5th Cir.), cert. denied, 510 U.S. 1014 (1993). Thus, the statutory construction that petitioner proposes would do little to address his "notice" concerns.

2. Petitioner contends (Br. 26-27) that his interpretation of the statute would promote "ease of administration." As petitioner himself points out elsewhere (Br. 19-20), there is good evidence that Congress subordinated that goal to others when it drafted Section 921(a)(20). See also J.A. 67; *United States* v. *Dahms*, 938 F.2d 131, 134 (9th Cir. 1991). In any event, it is far from clear why the burden of determining whether a particular State's law imposes any continuing firearms disability on its felons would be materially greater than the burden of determining the same State's law with respect to the particular firearms at issue in a given case. Compare J.A. 33-39 (district court's consideration of Massachusetts's law). And, as the court below noted in *Estrella* (J.A. 66-67), any additional labor that a court of appeals might face in its first case involving the law of a particular State would be more than offset by the fact that the first decision on this issue would also be the last decision that would be necessary for that State, in the absence of some later change in state law.

3. Finally, petitioner argues (Br. 25-26, 27-31) that it "makes no sense" for Section 921(a)(20) to maintain a comprehensive federal firearms prohibition if a State has balanced relevant interests and decided, as a matter of its own law, to restore to its felons some firearms privileges but not others. As with petitioner's argument based on legislative history and purposes, this argument reduces to the contention that Congress should have passed a much simpler law, under which the federal prohibition would simply have mirrored what each State prohibits to its own felons. The argument also founders for the same fundamental reason: Congress could certainly have passed such a law, but that is not what it did.

In any event, the policy rationale for what Congress did do has been recognized by the courts of appeals. Rather than setting out simply to give each State's own firearms restrictions on its felons the added force of a parallel federal prohibition, Congress in 1986 began with a statute that imposed a flat federal ban on gun possession by convicted felons. It concluded that if the State that rendered a conviction chose to nullify that conviction completely, then that decision should be respected for purposes of federal law. In addition, Congress decided that if a State entirely restored a felon to his "full civil rights, including allowing [him] to possess firearms" to the same extent as other citizens, then it had "effectively vouched for its convicted felon[], declaring [him] free of stigma and worthy of equal treatment by the federal government." *United States* v. *Driscoll*, 970 F.2d at 1480. Under those limited circumstances, the federal government would "defer to [that] decision and allow such persons to possess firearms." *Ibid.* It is only under those circumstances, however, that Congress has "promised to respect the states' decisions, and * * * not to burden those whom the states have exonerated." *Ibid.* If a State instead continues to give effect to its own convictions by limiting either its felons' general civil rights or their firearms privileges, then the federal government maintains its "original presumption" that that State's felons, like federal felons, should be entirely prohibited from possessing firearms. *Ibid.*; J.A. 62-63, 67; *Indelicato*, 97 F.3d at 630; *Lee*, 72 F.3d at 57; *McGrath* v. *United States*, 60 F.3d 1005, 1007 (2d Cir. 1995); *United States* v. *Meeks*, 987 F.2d 575, 578 (9th Cir.), cert. denied, 510 U.S. 919 (1993).

Petitioner disputes the cogency of this rationale as a full explanation for the particular statutory scheme enacted by Congress (Pet. Br. 28-31), but that argument is largely beside the point. What the "fairly straightforward federal plan" (*Driscoll*, 970 F.2d at 1481) described above makes plain is that, contrary to petitioner's contention (Br. 25), there is nothing "irrational[]" about the all-or-nothing rule adopted by Congress in the "unless" clause of Section 921(a)(20). That being so, the statute must be applied in accordance with its terms. Compare *Beecham*, 511 U.S. at 374.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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GERALD R. CARON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

RELEVANT STATUTES 1

ARGUMENT 2

BOTH THE GOVERNMENT'S KEY ARGUMENT – THAT THE "ALL OR NOTHING" VIEW IS REQUIRED CONSTRUCTION "PARALLEL" TO THE WAY THE PHRASE "SHIP, TRANSPORT, POSSESS, OR RECEIVE" IN THE PARDON/CIVIL-RIGHTS'-RESTORATION EXEMPTION MUST BE CONSTRUED – AND ITS SUPPORTING ARGUMENT BASED ON THE WORD "ANY" IN THE STATUTORY DEFINITION OF "FIREMAN" LACK MERIT 2

1. The Government's "Parallel Construction" Argument 3

2. The Government's Appeal to the Word "Any" in the Statutory Definition of "Firearm" 7

3. Additional Notes 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Lewis v. United States, No. 96-7151, 66 U.S.L.W. 4194 (March 9, 1998) 9

Perrin v. United States, 444 U.S. 41 (1979)..... 4

United States v. Estrella, 104 F.3d 3 (January 9, 1997) *cert. denied*, 117 S.Ct. 2494 (1997)..... 4

United States v. Qualls, 108 F.3d 1019 (9th Cir. 1997) ....

United States v. Qualls, 1998 WL 149393 (9th Cir. April 2, 1998) (en banc) 3

STATUTES

18 U.S.C. § 13(a) 9

18 U.S.C. § 921(a)(3)..... 1, 3, 7

18 U.S.C. § 921(a)(20)..... 1

18 U.S.C. § 922(g) 1

Mass. Gen. L. ch. 140, § 129B..... 5

Mass. Gen. L. ch. 269, § 10(a)..... 5

MISCELLANEOUS

Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 Vanderbilt L.R. 395 (1950) 6

RELEVANT STATUTES

1. Section 921(a)(20) of Title 18 of the United States Code says in part:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. Section 921(a)(3) of Title 18 of the United States Code says:

> (3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

3. Section 922(g) of Title 18 of the United States Code says in pertinent part:

> It shall be unlawful for any person –
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year,
>
> . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm

or ammunition which has been shipped or transported in interstate or foreign commerce.

ARGUMENT

BOTH THE GOVERNMENT'S KEY ARGUMENT – THAT THE "ALL OR NOTHING" VIEW IS REQUIRED BY CONSTRUCTION "PARALLEL" TO THE WAY THE PHRASE "SHIP, TRANSPORT, POSSESS, OR RECEIVE" IN THE PARDON/CIVIL-RIGHTS'-RESTORATION EXEMPTION MUST BE CONSTRUED – AND ITS SUPPORTING ARGUMENT BASED ON THE WORD "ANY" IN THE STATUTORY DEFINITION OF "FIREARM" LACK MERIT

The government takes the position that the pardon/rights' restoration exemption from the federal firearms law – that a prior conviction does not count if the pardon or restoration of civil rights "expressly provides that the person may not ship, transport, possess, or receive firearms" must be read as "all or nothing." In other words, if there are firearms that the pardon or restoration of rights denies the person, he has no exemption from federal law, even for guns the pardon or restoration of rights allows him.

The government clearly accepts petitioner's ("defendant's") central point in the first agreement in his brief: that a pardon or restoration of rights that allows a person some (but not all) guns is *not* one that provides that the person may not possess firearms – and that any other reading does violence to ordinary usage. Instead, the government's primary argument is that the statute's use of four alternative verbs and its use of the word "any" in

the statutory definition of "firearms" (18 U.S.C. § 921(a)(3)) change the entire meaning of the sentence at issue.

This reply brief addresses this primary government argument. (We do not think further briefing on the other issues would assist the Court.[1])

1. The Government's "Parallel Construction" Argument

The government's key argument appears in just three sentences in the paragraph beginning on p. 15 of its brief ("Br."). The government notes that the "unless" clause includes not just a single verb (such as "possess") but four verbs stated in the alternative, *i.e.*, "ship," "transport," "possess," and "receive." This "enumeration" of four alternative restrictions, it says, "immediately suggests" that the "unless" clause is true – and any pardon or civil rights' restoration of no help to a felon-in-possession or ACCA defendant – "if the State continues to limit a felon's firearms privileges in any of the listed ways." Br. 15-16. It then asserts that by "parallel construction" the "unless" clause is true "if the State imposes such limitations with respect to any 'firearms.' " Br. 16. (This argument is repeated at Br. 17, n.7.)

The argument does not hold up under scrutiny.

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[1] We note the Ninth Circuit's April 2, 1998 en banc opinion in *United States v. Qualls*, 1998 WL 149393, sent the Clerk by the Solicitor General by letter of April 3. (The panel opinion is reported at 108 F.3d 1019.) The majority opinion, which rejects the "all or nothing" view, is based upon the goal of deference to state interests, as is defendant's second main argument in his opening brief (at pp. 18-23).

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First, the idea that the "all or nothing" view is correct because the "expressly provides" clause has four verbs rather than just one is remarkable. As already noted, the government obviously concedes that no speaker of English would say that a pardon that allowed the person pardoned to possess hunting guns but not handguns "provides that the person may not possess firearms." But, it says, if one adds to the clause the words "ship," "transport," and "receive" alongside the word "possess," the entire meaning of the clause changes and its reading is shown to be correct. This contention might come as a surprise to an ordinary person, perhaps unfamiliar with the way lawyers are trained to read. (Needless to say, statutes usually *are* to be read the way ordinary people would read them. "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 41, 42 (1979).)

Adding the three verbs changes nothing. If a pardon provides the pardoned person "may ship, transport, possess, and receive hunting guns and may not ship, transport, possess, or receive handguns," no one would then say that the pardon expressly provides that the person may not ship, transport, possess, or receive firearms. One *would* say that there are firearms that the pardon expressly provides that the person may not ship, transport, possess, or receive. But this is quite different, just as "I dislike people" differs altogether from "There are people that I dislike."

Second, the government is simply wrong in saying that the "enumeration" of various restrictions, listed in the alternative, immediately "suggests" that if *any* one of

the four activities of shipping, transporting, possessing, or receiving firearms is prohibited by a pardon or restoration of rights, the "unless" clause applies and the person gets no exemption from the firearms law. It suggests nothing of the kind. If an anti-tobacco philanthropist leaves money for maintenance of a college's buildings on condition that the college provide that people may not smoke or chew tobacco in the buildings, it would violate the bequest's terms for the college to bar tobacco chewing but allow smoking. A provision that people may not smoke *or* chew tobacco bars people from smoking tobacco and bars them from chewing tobacco.

Likewise, a provision that someone may not ship, transport, possess, or receive firearms requires that the person neither ship, transport, possess, nor receive firearms. Of course, the four verbs overlap: a ban on possessing firearms seemingly bans shipping, transporting, and receiving them. Suppose, however, a pardon allows a person to possess guns at home but prohibits him from transporting or carrying them outside the home. (The example is not fanciful. As *United States v. Estrella*, 104 F.3d 3, 7, *cert. denied*, 117 S.Ct. 2494 (1997) (J.A. at 65), notes, Massachusetts, while forever prohibiting felons from carrying handguns, five years after a felon's release from imprisonment terminates its bar on possessing handguns at home or place of business. Mass. Gen. L. ch. 140, § 129B and ch. 269, § 10(a).) Though the pardon bars transporting, it is false, given the pardon's stipulation allowing possession of certain firearms (at home), to say that the pardon "provides that the person may not ship, transport, possess, or receive firearms."

Third, one *construes* words and phrases only when there is a question about what they mean. That both the phrase "ship, transport, possess, or receive" and the word "firearms" as used in the operative sentence can, in the government's view, be *construed* – let alone that they can be construed in "parallel" manner – suggests there is some uncertainty about the meaning of the phrase and the word. If that is the case – if Congress in the six-word phrase "ship, transport, possess, or receive firearms" created *two* problems of construction – then the meaning of the statute is certainly unclear and the rule of lenity must apply. Also, if the word "firearms" becomes clear only by construction "parallel" to the construction of "ship, transport, possess, or receive," there must be another way of "construing" it that is not in parallel with the way "ship, transport, possess, or receive" must be construed. If so, the government nowhere explains why this is a proper case for applying, rather than *not* applying, whatever rule of construction it claims to be using. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*. 3 Vanderbilt L.R. 395 (1950).

And what *is* the method of construction that the government says applies, in parallel fashion, to both "ship, transport, possess, or receive" and to "firearms" as used in the statute? A series of words expressed in the alternative may sometimes need construction – hence "ejusdem generis," "noscitur a sociis," and like canons. But "firearms" is a single word, not an "enumeration" of alternatives. How, then, can it be construed in *parallel* to such an enumeration?

Suppose, indeed, that the statute did have, instead of the single word "firearms," an enumeration. Suppose it said that convictions for which there is a pardon or rights' – restoration do not count "unless such pardon or restoration or civil rights expressly provides that the person may not ship, transport, possess, or receive long-barreled guns or handguns." Would *that* phrasing make the government's view true? Clearly not. One does not expressly provide that a child many not have ice cream or candy by telling him he may have ice cream but not candy. Nor does one expressly provide that a person may not have long guns or handguns by telling him he may have long guns but not handguns.

2. The Government's Appeal to the Word "Any" in the Statutory Definition of "Firearm"

The government says that the conclusion it arrives at by parallel construction is reinforced by the fact that the definition of "firearm" in 18 U.S.C. § 921(a)(3) uses the word "any" – "any" weapon that expels a projectile by action of explosive, the frame of "any" such weapon, "any" silencer, or "any" destructive device. But what if the "expressly provides" clause had read "unless such . . . pardon or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive any firearms"? The addition of the word "any" changes the clause's meaning not a particle. Telling a child she may not have candy on weekdays is no different from telling her she may not have any candy on weekdays.

3. Additional Note

The "all or nothing" view is right, the government says, *because* of the arguments about parallel construction of the enumeration of alternatives and about the "any"s in the definition of "firearms." This would be news to the courts, like the circuit court here, that adopted the "all or nothing" view without the linguistic gyrations that the government deems necessary.

The matter, we submit, is simpler than that. The "all or nothing" courts just read the statute incorrectly, opposite to the only way normal people would or could. Saying that a pardon or restoration of rights provides one may not ship, transport, possess, or receive firearms is utterly different from saying that there are firearms that a pardon or restoration of rights provides one may not ship, transport, possess, or receive. There is only one way to read the statute and that reading contradicts the "all or nothing" view held by the government and the circuit court. The government's efforts to tease an alternative meaning out of the statute's words are in vain.

That the only possible reading has – if one is being pedantic – the consequence that a pardoned or rights' – restored felon is exempt from felon-in-possession prosecution even if he possesses a firearm that the pardon or rights'– restoration disallows would give an ordinary person not a moment's pause. The government insists that defendant is stuck with that pedantic view, even though the government knows full well that literal

readings should not always be followed.[2] ("If the words ["any enactment" in the Assimilative Crimes Act, 18 U.S.C. § 13(a)] are taken literally, then Louisiana's law [against first-degree murder] could not possibly apply . . . We agree with the Government, however, that this is not a sensible interpretation of this language, since a literal reading of the words "any enactment" would dramatically separate the statute from its intended purpose." *Lewis v. United States*, No. 96-7151 (March 9, 1998), 66 U.S.L.W. 4194, 4195.)

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[2] Indeed, the government's "all or nothing" reading of the statute – even were it a possible reading – could itself lead to a counterintuitive result if the statute's words are taken literally. If a pardon were worded so as to allow a person "all firearms except those no one may possess (sawed off shotguns, bazookas, etc.)," the limitation the pardon places on (wholly illegal) firearms' possession would, on the government's theory, prevent the pardon from exempting the person from federal firearms law.

CONCLUSION

Petitioner reiterates his request that (1) the judgment of the court of appeals be reversed – and thus that the district court judgment be reinstated in finding petitioner not eligible for sentencing under the Armed Career Criminal Act – and (2) the order of the court of appeals dismissing petitioner's cross-appeal (of the district court's upward departure) be vacated.

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